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000419

## 7. Snohomish County Hearing Examiner's Decision.





Snohomish County

Hearing Examiner's Office

BEFORE THE

Email: Hearing.Examiner@co.snohomish.wa.us

## SNOHOMISH COUNTY HEARING EXAMINER

Barbara Dylas  
Hearing Examiner

## DECISION of the HEARING EXAMINER PRO TEM

Ed Wood  
Deputy Hearing ExaminerM/S 405  
3000 Rockefeller Ave.,  
Everett, WA 98201

In the Matter of the Appeal of )

MAP #2 LLC )

Appeal of a Notice and Order )

FILE NO. 06 127119 CT

(425) 368-3538  
FAX (425) 368-3201

DATE OF DECISION: September 12, 2007

DECISION (SUMMARY): Notice and Order AFFIRMED. Appeal DENIED. Monetary penalty assessed, and Appellant ordered to prepare Critical Areas Study and apply for necessary permits to remove fill.

## BASIC INFORMATION

LOCATION: The subject property is located on Smith Island in the Snohomish River Estuary; Street address is 805 80<sup>th</sup> Street SW, Everett, WA, 98205.

## PROCEDURAL MATTERS

Motions to dismiss and to exclude evidence were made, and either denied or delayed until an occasion arose for decision.

RECEIVED

PUBLIC HEARING

The public hearing commenced on July 17, 2007 at 2:00 p.m.

1. Appellant was represented by Jane Ryan Koler, Attorney.

06127119.doc

SEP 12 2007

PROSECUTING ATTORNEY  
FOR SNOHOMISH COUNTY  
CIVIL DIVISION

TIME: \_\_\_\_\_

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2. Snohomish County was represented by Elizabeth E. Anderson, Deputy Prosecuting Attorney.
3. The Hearing Examiner was Gordon F. Crandall, Hearing Pro Tem.
4. The hearing was held on July 17, 2007 and August 7 and 8, 2007. The hearing concluded on August 8, 2007 at 1:21 p.m.
5. Following the conclusion of the hearing, the Examiner made a site visit accompanied by the attorneys, Paul Anderson of the Department of Ecology and Tom Finnerty of Pacific Topsoils.

Final summaries were submitted by both parties in writing on August 15, 2007.

**NOTE:** For a complete record, an electronic recording of this hearing is available in the Office of the Hearing Examiner.

## FINDINGS, CONCLUSIONS AND DECISION

### FINDINGS OF FACT

Based on all the evidence of record, the following findings of fact are entered.

1. The master list of exhibits and witnesses which is a part of this file and which exhibits were considered by the Examiner is hereby made a part of this file as if set forth in full herein.
2. On June 27, 2006, Snohomish County Department of Planning and Development Services (PDS), Code Enforcement, received a request from Peggy Toepel, president of Everett Shorelines Coalition, to investigate a possible violation of the county's Critical Areas Regulations. She reported that she and two others observed a dump truck, plus trailer, hauling dirt onto a pile of fill soil spread on top of a low-lying wetland meadow on Smith Island.
3. The request for investigation was assigned to Code Enforcement Officer Craig Odegaard. He determined that grading at the site had occurred without obtaining the necessary permits, and made contact with personnel of MAP #2 LLC, the owner of the land on which the fill was located.
4. On September 22, 2006, MAP #2 LLC entered into a voluntary correction agreement. The agreement recited that MAP #2 LLC had allowed grading to occur on its property in excess of 100 cubic yards without obtaining the necessary permits and/or approvals as required by the Snohomish County Code, (grading, flood hazard, shoreline substantial development). The agreement required MAP #2 LLC to cease all grading activities and obtain the necessary permits and/or approvals. The required correction date was January 15, 2007. The agreement was signed by Craig Odegaard, Code Enforcement Officer, by Melody Rucci, Code Enforcement Supervisor, and by Dave Foreman, the registered agent for MAP #2 LLC.
5. Peggy Toepel of the Everett Shorelines Coalition also made a request for investigation by the Washington State Department of Ecology (DOE). DOE commenced an investigation and referred the

matter to Paul Anderson, its field representative for Snohomish, Skagit and San Juan Counties. County officials expressed an interest in coordinating its enforcement action with DOE.

6. MAP #2 LLC failed to apply for the necessary permits by the correction date, and on February 5, 2007, PDS issued a Notice and Order with respect to the grading activity done without first acquiring permits. The required corrective action in the Notice and Order was to remove the fill that was placed illegally without permits and restore the area per an approved restoration plan. The Order stated further that "prior to removal of the fill a critical areas study containing a restoration plan shall be submitted for Snohomish County review and approval." Wetland and buffer restoration was also required. The required correction date was April 6, 2007.
7. On February 16, 2007, MAP #2 LLC filed an appeal of the Notice and Order. The appeal alleged that the Notice and Order was defective and violated appellants' right to due process and fundamental fairness for various reasons (Exhibit 22), and asked that the Notice and Order be dismissed or that the deadlines expressed in the Notice and Order be extended.
8. The estimated amount of fill placed on the Smith Island site is from 75,000-150,000 cubic yards. The fill is from 15 to 17 feet in depth.
9. In March, 2007, Dr. James Kelly, a principal of AC Kindig and Company, Environmental Consulting, was engaged by MAP #2 LLC to do a wetland study of the site. Kelly issued a preliminary draft report on July 16, 2007 in which he indicated that:
  - (1) There is strong evidence that no wetlands are present under a majority of the fill;
  - (2) There is a small wetland at the northwest edge of the fill;
  - (3) Some areas south and west of the fill may meet wetland hydrology criteria;
  - (4) Wet soil areas were found beneath the fill, estimated to be about 0.1 to 0.2 acres in area, which need further evaluation to determine if they are wetlands;
  - (5) Fill dirt in this area could be removed to facilitate hydrologic evaluation in the Spring of 2008; in other areas of the fill additional data could be collected using borings, or monitoring wells;
  - (6) The studies to date are preliminary and should be more thoroughly documented in a technical memorandum.
10. Wetland functions include water quality and improvements, flood water storage, fish and wildlife habitat, aesthetics, and biological productivity. The value of a wetland is an estimate of the importance or worth of one or more of its functions to society. Dr. Kelly concluded that the fill here had no effect on the functionality of any wetland.
11. Jenna Friebe, an engineering associate of Parametrix concluded that the area occupied by the fill was not needed for flood water storage, in that it would not increase the level of flood waters in a 100-year storm more than 12 inches. Liz Burns of PDS disagreed, and concluded that an area occupied by 150,000 cubic yards of fill would significantly affect the level of flooding in a 100-year storm event.
12. A fill 17 feet in depth will compress the native soil underneath from one to two feet. However, the fill would not affect the level of the water table.
13. It would cost from 4-5 million dollars to remove the fill and relocate it. Such an operation would involve 15,000 dump truck loads and a 2-1/2 hour round trip.
14. As of the date of the appeal hearing, no application for any permit has been filed with PDS.

15. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

### CONCLUSIONS OF LAW

1. The Hearing Examiner is authorized to hear an appeal from a Notice and Order and to make a decision on the appeal. SCC 2.02.020; 30.85.200; 30.85.210.
2. Grading in excess of 100 cubic yards requires a grading permit. SCC 30.63B.010. A landfill in a shoreline environment requires a substantial development permit. SCC 30.44.205. Filling in a flood hazard zone requires a flood hazard permit. SCC 30.43C.020.
3. Appellants' contentions are summarized as follows:

The County is not justified in requiring that the fill be removed. The County routinely issues "after the fact" permits when work is done without a permit. The area is zoned Industrial and there are other enormous fills in the area. The County can impose penalties instead of requiring the fill to be removed.

Dr. Kelly made a preliminary study of the area to determine whether any part of the site was a wetland. He concluded that there was a small wetland at the northwest edge of the fill and that the areas south and west of the fill needed more study to determine if these areas contained wetlands. Removal of the fill is not needed to make this determination. Paul Anderson of DOE did not make a wetland delineation and his conclusion that the fill must be removed to do so was in error.

The fill does not affect flood storage, as it is adjacent to Puget Sound with unlimited capacity for floodwater storage.

The County committed various procedural errors, such as deviation from procedures for designated wetlands, failing to follow code requirements for issuance of Notice and Order, not charging appellant with a "nuisance", and the Notice and Order was not specific as to which acts were violations.

4. Snohomish County's contentions are summarized as follows:

The violation is egregious and undisputed. There has been no progress towards compliance as agreed in the voluntary correction agreement. Three permits are required for the work: grading, substantial development (shoreline) and flood hazard. Appellant has failed to apply for any permits or to submit the required critical areas study.

In making a decision on the appropriate remedy for a code violation, the relevant factors include the egregiousness of the violation, whether the violation was intentional, whether the owner is an experienced business man familiar with land use regulations, the length of time before commencing compliance, the uncertainty of getting permits, the lack of apparent progress and coming into compliance, and whether environmentally sensitive areas are included. All of these factors are present in this case. The County has discretion to order appropriate correction of a violation, and has done so by ordering removal of the fill. Wetland areas and their buffers must be restored. The procedural errors charged are without merit. All violations of the code are nuisances which may be subject to abatement. The appeal should be dismissed and the appellant should be ordered to abate the violation by removing the fill. The Hearing Examiner should retain jurisdiction to enforce compliance with the County's requirements.

5. The code violation, "allowing grading to occur without obtaining the necessary permits" was clearly established. The required correction action in the February 6, 2007 Notice and Order (Exhibit 18) required the appellant "to remove the fill that was placed illegally without permits and restore the area per an approved restoration plan. Prior to removal of the fill a critical areas study containing a restoration plan was to be submitted for Snohomish County review and approval. Wetland and buffer restoration was required for non-authorized grading activities. The required correction date was April 6, 2007."
6. Appellant did not make any apparent effort to comply with the Notice and Order until March of 2007 when it engaged Dr. James Kelly to do the critical areas study required by the Order. By July 16, 2007 Dr. Kelly was able to issue the preliminary draft report referred to in Finding of Fact No. 9. The required correction date had long since expired.
7. Appellant's site manager testified that it would take 15,000 dump truck and trailer loads to remove the fill. This testimony establishes that MAP #2 illegally dumped 15,000 loads of fill dirt at the site without obtaining the necessary permits.
8. The violations were clearly established by a preponderance of the evidence and the County enforcement officials (PDS) have discretion to fashion a remedy that fits the violation. The decisions of PDS as to compliance should not be disturbed absent abuse of discretion. The Examiner is convinced that this is not the case, given the record made at the hearing. The procedural errors alleged by Appellant are without merit.
9. The Notice and Order should be affirmed. Appellant is ordered to complete and submit the Critical Areas Study containing a restoration plan to the County for its review and approval. Wetlands and buffers shall be restored. It will be for PDS to determine whether an "after the fact" grading permit can or should be issued for any area where fill can be placed legally following a good faith effort by MAP #2 to comply with the County's requirements and this decision.
10. Monetary penalties of \$250 per day each and every day the violation continues to exist starting at the date of this order are imposed and shall accrue and be ongoing in accordance with SCC 30.85.260, until PDS makes a determination that the required corrections have been completed to the satisfaction of the department.
11. Any Finding of Fact deemed to be a Conclusion of Law is adopted as such.

#### DECISION

The Notice and Order is AFFIRMED. The appeal of the Notice and Order is DENIED. Appellant is ordered to apply for the necessary permits and prepare and submit a Critical Areas Study containing a restoration plan to the County for its review and approval. Wetlands and buffers shall be restored. Appellant shall pay to Snohomish County a monetary penalty for the violation found to exist of \$250 per day starting on the date of this order for each day the violation continues to exist on the site until PDS makes a determination that the required corrections have been completed.

Decision issued September 12, 2007

for: Mary F. Crandall, Admin. Asst.  
Gordon F. Crandall, Hearing Examiner Pro Tem

**EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES**

The decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also be sought by one or more parties of record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council Rules of Procedure.

**Reconsideration**

Any party of record may request reconsideration by the Examiner. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2<sup>nd</sup> Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before SEPTEMBER 24, 2007. There is no fee for filing a petition for reconsideration. "The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing." [SCC 30.72.065]

A petition for reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner's attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested; state the relief requested; and, where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the applicant.

The grounds for seeking reconsideration are limited to the following:

- (a) The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner's decision;
- (c) The Hearing Examiner committed an error of law;
- (d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
- (e) New evidence which could not reasonably have been produced and which is material to the decision is discovered; or
- (f) The applicant proposed changes to the application in response to deficiencies identified in the decision.

Petitions for reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.72.065. Please include the County file number in any correspondence regarding this case.

This decision of the Hearing Examiner is final and conclusive with right of judicial review in Superior Court pursuant to the Land Use Petition Act, Chapter 36.70C RCW. However, reconsideration by the Examiner may also be sought by one or more parties of record. (The Examiner's action on reconsideration would be subject to appeal to Court.) The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration procedures, please see Chapter 30.72 SCC and the Examiner rules of procedure.

**EXPLANATION OF APPEAL PROCEDURES**

The following paragraphs summarize the appeal process. For more information about appeals to Superior Court, please see Chapter 36.70C RCW, RCW 43.21C.075, WAC 197-11-680, Chapter 30.85 SCC and applicable court rules.

Pursuant to Chapter 30.85 SCC and Chapter 36.70C RCW, any person having standing under RCW 36.70C.060 may file a Land Use Petition in Superior Court. Service on parties must be as required by RCW 36.70C.040.

The cost of transcribing the record of proceedings, of copying photographs, video tapes, and oversized documents, and of staff time spent in copying and assembling the record and preparing the return for filing with the court shall be borne by the petitioner. [RCW 36.70C.110] Please include the county file number in any correspondence regarding this case.

Staff Distribution:

Department of Planning and Development Services: Craig Odegaard  
Prosecuting Attorney's Office: Liza Anderson

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.

SEP-13-2007 THU 10:17 AM SNO PROS ATTY-CIVIL

FAX NO. 425 338 6333

P. 08

RTIES OF RECORD REGISTER  
MAP #2 05 127119  
APPEAL N&O UPDATED 8-29-07(MK)

MAP #2 LLC  
805 80TH ST SW  
EVERETT WA 98205

SNO CO DEPT OF PLAN & DEV SVCS  
CRAIG ODEGAARD  
3000 ROCKEFELLER AVENUE/S 604  
EVERETT WA 98201

ATTY AT LAW  
JANE RYAN KOLER  
PO BOX 2509  
GIG HARBOR WA 98325

SNO CO PROSECUTOR'S OFFICE  
ELIZABETH ANDERSON  
3000 ROCKEFELLER AVENUE/S 604  
EVERETT WA 98201

MARK WOLKEN  
2601 HILLSIDE LANE  
EVERETT WA 98203-1409

PEGGY TCEPEL  
P O BOX 13289  
EVERETT WA 98206

A C KINDIG  
JAMES KELLEY  
P O BOX 2486  
REDMOND WA 98073

001749



8. Settlement Agreement with Snohomish County.

Jan. 29, 2009 7:50AM

No. 0048 P. 3

**AGREEMENT BETWEEN SNOHOMISH COUNTY,  
PACIFIC TOPSOILS, INC. AND M.A.P. #2, LLC**

**AGREEMENT**

This Agreement is entered into by and Between Snohomish County ("County"), a political subdivision of the State of Washington, Pacific Topsoils, Inc. ("Pacific Topsoils") and M.A.P. #2, LLC ("MAP"), the owner of the real property ("Property") described below.

**RECITALS**

WHEREAS, MAP, is the owner of property ("MAP site") identified by Snohomish County Tax Account No. 290505-004-004-00.

WHEREAS, Snohomish County issued a Notice and Order of Penalty requiring MAP to remove all fill from the MAP site which the Snohomish County Superior Court (Cause No. 07-2-07743-8) upheld in a LUPA appeal except for one issue.

WHEREAS, MAP #2, LLC is the owner of property on Smith Island ("Weyerhaeuser Wood Waste site" or Weyerhaeuser site") identified by Snohomish County Tax Account No. 290505-004-006-00, Everett, WA 98205. The Weyerhaeuser site is adjacent to the MAP site.

WHEREAS, the Weyerhaeuser site is subject to an Ecology approved Model Toxics Control Act (MTCA) cleanup action to contain contaminants from the site. Pacific Topsoils is completing the decommissioning of the former wood waste landfill and placing a cap/top on the former Weyerhaeuser site. The cleanup work is being done pursuant to a plan approved by the Snohomish Health District and the Washington State Department of Ecology, and other permits and approvals from Snohomish County and the City of Everett.

Appendix<sup>A</sup>-000000328

Jan. 29. 2009 7:51AM

No. 0048 P. 4

WHEREAS, Pacific Topsoils' grading permit, which authorizes creation of the cap/top on the Weyerhaeuser site, expired on August 5, 2008.

WHEREAS, Pacific Topsoils desires to utilize the fill that was unlawfully placed on the MAP site to complete the capping/topping work at the Weyerhaeuser site authorized under state, health district, county and city permits and approvals. The County believes it is in the best interest of the public health and environment to facilitate the completion of the MTCA work on the Weyerhaeuser site, and to expedite the removal of the unlawful fill placed on the MAP site in accordance with certain conditions set forth below.

NOW, therefore, in exchange for mutual promises the parties agree as follows:

1. MAP agrees to obtain permits to authorize all grading activity and related restoration and remediation work on the MAP site.
2. Snohomish County will allow grading to be done on the Weyerhaeuser site and fill to be removed from the MAP site for placement on the Weyerhaeuser site before issuance of a grading permit and related restoration and remediation approvals upon accomplishment of the following conditions:

(a) MAP shall submit a grading permit application, a Shoreline Management Act permit application, a floodplain permit application, a SEPA checklist, and any other necessary permit applications required by the County for the MAP site to Snohomish County by October 31, 2008.

(b) MAP shall pay to Snohomish County a grading permit fee (\$23,200) and an associated investigation fee (\$23,200) in the total amount of \$46,400 at the time it applies for a grading permit to remove fill from the MAP site. Payment shall be made to "Snohomish County" and delivered to Tom Rowe or his designee, Admin. W. 2<sup>nd</sup> Floor, 3000 Rockefeller Ave., Everett, WA 98201.

Jan. 29. 2009 7:51AM

No. 0048 P. 5

(c) By August 15, 2008, MAP will present to Snohomish County a written recommendation from Dr. James Kelley, a wetland biologist, identifying the areas from which material will first be removed from the MAP site and equipment that will be used in removal of materials and the amount of material that will be left in place to insure that no further damage is done to critical areas by the soil removal process on the MAP site.

(d) Pacific Topsoils will present a SEPA checklist and grading permit application for the ~~former DB~~ Weyerhaeuser site to Snohomish County on August 8, 2008.

(e) Pacific Topsoils will submit to the County a monthly geotechnical certification report that all material placed on the ~~former DB~~ Weyerhaeuser site meets the geotechnical recommendations of the latest closure plan for material and placement.

~~former DB~~ This monthly report will only be required until a grading permit is issued for the Weyerhaeuser site.

(f) Pacific Topsoils will present written confirmation from the Washington State Department of Ecology (DOE) stating that work on the cap can continue even though Pacific Topsoils NPDES permit for the ~~former DB~~ Weyerhaeuser site is due to expire.

3. MAP will present a wetland restoration plan for the MAP site no later than August 16, 2008.

4. Snohomish County will allow MAP to remove suitable materials from the "stockpile" on the MAP site before obtaining permits to authorize the grading and related restoration and remediation plan approval for the MAP site, and to place suitable materials from that "stockpile" on the ~~former DB~~ Weyerhaeuser cleanup site before a grading permit is obtained to facilitate completion of the ~~former DB~~ Weyerhaeuser site cap/top which is part of the remediation plan for that property. MAP will submit a copy of the complete application for the MAP site by October 10, 2008.

Jan. 29. 2009 7:51AM

No. 0048 P. 6

5. Snohomish County is allowing such actions to occur because it serves the public welfare to complete the cap on the contaminated <sup>Former Del</sup> Weyerhaeuser site as expeditiously as possible. Further, removing the fill materials from the MAP site as early as possible helps to preserve any critical areas located beneath the "stockpile" on the MAP #2 site. Removal of any fill located on wetlands helps to prevent damage to wetlands.

6. Monetary penalties on the MAP site (Snohomish County Cause No. 07-2-07743-8) commenced on September 13, 2007. The Parties agree that monetary penalties ceased accruing on August 7, 2008, the date that Pacific Topsoils filed its grading permit application for the <sup>Former Del</sup> Weyerhaeuser remediation site. The Parties agree that MAP owes the County monetary penalties in the amount of \$72,248.

7. MAP shall satisfy the penalty owed the County by: (a) paying to the County the amount of \$72,248; or (b) paying to the County the amount of \$36,124 and providing in-kind wetland enhancement to increase the functions and values of the wetlands on the MAP site in the amount of \$36,124. The value of the in-kind wetland enhancement on the MAP site shall be the "fair market value", and shall be in addition to the work required to remove the fill and to restore the wetlands and buffers on the MAP site to their pre-violation state as set forth in the Hearing Examiner's September 12, 2007, Order.

8. Satisfaction of the terms set forth in paragraphs 6 and 7 shall be subject to the following schedule.

Jan. 29. 2009. 7:51AM

No. 0048 F. 7

Option (a): Monetary penalties in the amount of \$72,248 shall be paid to the County in two equal payments. The first payment of \$36,124 shall be due no later than December 10, 2008. The second payment of \$36,124 shall be due no later than December 10, 2009.

Option (b): Monetary penalties in the amount of \$38,124 shall be paid to the County in two equal payments. The first payment of \$18,062 shall be due no later than December 10, 2008. The second payment of \$18,062 shall be due no later than December 10, 2009. The in-kind wetland enhancement on the MAP site in the amount of \$38,124 shall be completed to the satisfaction of the County by December 10, 2009. Pacific Topsoils will exercise good faith efforts to complete dirt removal and wetland restoration work by December 10, 2009. If it is unable to timely complete such work and has been exercising good faith efforts to do so, and has made substantial progress, the County may extend the deadline specified for a reasonable period.

9. The monetary value of in-kind wetland enhancement shall be determined by the fair market value of labor required to install mitigation features and the fair market value of plants and mitigation materials utilized. Any disputes about the fair market value of the in-kind wetland enhancement shall be resolved by binding arbitration. If MAP fails to timely pay penalties or to perform the additional wetland enhancement work as set forth in paragraphs 6-9, the entire sum of \$72,248 shall be due.

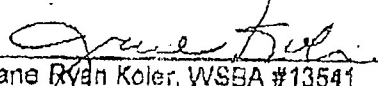
10. MAP shall immediately withdraw its remaining appeal issue that was remanded to the Snohomish County Hearing Examiner by the Snohomish County Superior Court in Cause No. 07-2-07743-8, upon the execution of this Agreement.

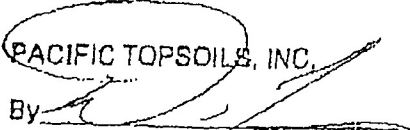
Jan. 29. 2009 7:52AM

No. 0049 P. 8


DATED this 10 day of December, 2008.

LAW OFFICES OF JANE RYAN KOLER, P.L.L.C.

  
 Jane Ryan Koler, WSBA #13541

  
 PACIFIC TOPSOILS, INC.

 By [Signature]  
 Dave Forman  
 President  
 Pacific Topsoils, Inc.

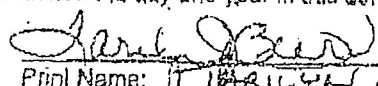
  
 M.A.P. #2, LLC

 By [Signature]  
 Dave Forman  
 Managing Member  
 M.A.P. #2, LLC

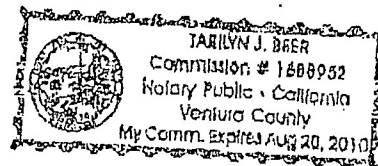
 CALIFORNIA  
 STATE OF WASHINGTON }  
 RIVERSIDE } 85.  
 COUNTY OF SNOHOMISH }

On this 10<sup>th</sup> day of December, 2008, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Dave Forman CALIFORNIA to me personally known (or proven on the basis of satisfactory evidence) to be the Washington Drivers License F0R445590LC the individual who executed the within and foregoing instrument, and acknowledged said instrument to be his free and voluntary act and deed.

WITNESS my hand and seal hereto affixed the day and year in this certificate above written.

  
 Print Name: TARYN J. BEER  
 NOTARY PUBLIC, in and for the State of CALIFORNIA  
 Washington, residing at Palm Desert, CA  
 My Commission expires: August 20, 2010

SNOHOMISH COUNTY

 By Tom Rowe 1/22/09  
 Tom Rowe, Division Manager  
 Snohomish County Department of  
 Planning and Development Services


9. Parametrix documents stating that its study is preliminary and that it contains speculative, undocumented conclusions regarding wetland filling.



Janusz Bajsarowicz

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From: Becky Reininger [breininger@parametrix.com]  
Sent: Friday, December 01, 2006 2:23 PM  
To: januszb@pacifictopsoils.com  
Subject: wetland and floodplain memos

Hi Janusz,

I have seen drafts of both the wetland and the floodplain memos, but neither is quite ready to send to you yet. I'm hoping for Monday for the wetland memo, but I'm not sure of Andrea's schedule, and Tuesday for the floodplain (Jenna will not be in on Monday). In summary, the floodplain memo does a good job, I think, of explaining why we don't really have any concerns there. The wetland memo concludes that mitigation would likely be required by the Corps, Ecology and SnoCo, and states that given the existing acreage of wetland on the project site and mitigation ratio requirements, complying with local regulations to provide mitigation, in the form of wetland creation on-site for further wetland fill may be difficult to achieve... With regard to your question of whether they were able to determine if it is in fact wetlands that were already filled, the memo states, "Without excavating the existing fill material, it is difficult to quantify how much, if any, of the 11.02 acres of area meets wetland criteria."

The 11.02 acres is based on some calculations that our GIS department did for me, based on my eyeballing the boundary of the area that you've already filled by looking at the aerial photos taken during the flooding. I'm attaching that drawing so you can let me know if you think I got the boundary close to reality.

Talk to you next week,  
Becky

Becky Reininger  
Environmental Planner  
Parametrix, Inc.  
411 108th Avenue NE  
Suite 1800  
Bellevue, WA 98004  
425-458-6387 (office)  
425-458-6363 (fax)  
425-466-2341 (cell)  
[breininger@parametrix.com](mailto:breininger@parametrix.com)

7/9/2007

Exhibit 6

00056712

Jane Ryan Koler

From: "Janusz Bajsarowicz" <januszb@pacifictopsoils.com>  
To: "Jane Koler" <jane@jkolerlaw.com>  
Sent: Wednesday, January 02, 2008 11:09 AM  
Subject: FW: Wetland text for submittal letter

Janusz Bajsarowicz  
Pacific Topsoils, Inc.  
(425) 337-2700 office  
(425) 514-3499 fax  
(425) 231-4526 mobile

From: Marti Louther [mailto:mlouther@parametrix.com]  
Sent: Wednesday, February 21, 2007 12:58 PM  
To: JanuszB@Pacifictopsoils.com  
Cc: Andrea Gates; Becky Reininger  
Subject: Wetland text for submittal letter

Janusz,

Per our telephone conversation today, I have recommended that Pacific Topsoil include a submittal letter to the County for the grading application. In this letter I suggest that a disclaimer is provided regarding how the wetland fill area was determined. In addition, you have asked whether or not PT should do additional soil borings in the wetland fill area, and I agree with that approach.

Please review the text below and let me know today if you have comments. I will be out of the office tomorrow and Friday but back in the office on Monday.

Thank you,  
Marti

Parametrix has preliminarily determined that about 7.81 acres of wetland has been filled on the Smith Island site (in a January 24, 2007 technical memorandum). This area has only been estimated based upon aerial photographic interpretation, data collected from existing on-site wetlands, and best professional judgement. Soil borings were not conducted to determine the limits of potential wetland fill.

In order to more accurately determine area of wetland fill, Pacific Topsoils is in the process of working with Parametrix wetland biologists to dig soil pits within the existing fill pile to further refine the amount of potential wetland area that was filled. Once this data has been collected and analyzed, it will be presented to Snohomish County, Ecology, and the Corp for their verification.

Marti Louther  
Wetland Ecologist  
Phone: (425) 458-6214  
(425) 458-6363  
mlouther@parametrix.com

Exhibit 7

PARAMETRIX

000553

13

**TECHNICAL MEMORANDUM**

Date: December 4, 2006  
To: Becky Reininger, Parametrix  
From: Andrea Gates, Parametrix  
Subject: Pacific Topsoils Inc., Smith Island Preliminary Wetland Findings  
cc: Marti Louthier, Parametrix, Project File  
Project Number: 555-5261-001 (01/03)  
Project Name: Pacific Topsoils Inc. Facility Expansion

---

Parametrix was retained by Pacific Topsoils Inc. to identify and field-delineate (flag) wetlands located north and west of an existing on-site Pacific Topsoils Inc. facility on the following Snohomish County Tax Parcels: 29050500400400, 29050500400600, 29050500300600, and 29050500300200. Parametrix was further retained to review and define boundaries of wetland impact identified by Snohomish County as a critical areas violation on tax parcel 29050500400400. Pacific Topsoils Inc. is located on Smith Island, south of Steamboat Slough and north of the Snohomish River, within unincorporated Snohomish County, Washington.

The purpose of this technical memorandum is to 1) describe the preliminary results of the one-day wetland field reconnaissance conducted at the Pacific Topsoils Inc. site on November 21, 2006, and 2) provide an outline of applicable wetland laws, regulations, and recommendations for action.

Topography within most of the project area is relatively flat, gently sloping to the west. The dominant plant community throughout the site is composed of grasses and forbs. Shrubs and small trees are found along stream corridors that coincide with and define the northern and western site boundaries. The eastern and southern site boundaries are roughly defined by gravel roadways. Fill material has been placed without a grading permit within the northeastern portion of the project site. The project site is approximately 34.6 acres in size, roughly 11.02 acres of the site has been filled with non-native soils.

**METHODS**

Prior to the field investigation, the National Wetlands Inventory (NWI) map, Marysville quadrangle (USFWS 1987), and the Soil Survey of Snohomish County, Washington (Debose and Klungland 1983) were reviewed to evaluate documented occurrence of wetlands and hydric soils in the project area. Black and white 1995 and color 2001 and 2003 aerial photographs of the project area and fill area were reviewed prior to Parametrix's field investigation.

This study followed the U.S. Army Corps of Engineers definition of wetlands. Wetlands are defined as areas saturated or inundated by surface or groundwater at a frequency and duration sufficient to support, and which under normal circumstances do support, a prevalence of vegetation adapted for life in saturated soil conditions (Environmental Laboratory 1987). The methods specified in the *Corps of Engineers Wetlands Delineation Manual* (Environmental Laboratory 1987) were used to delineate on-site wetlands. These methods comply with those in the *Washington State Wetland Identification and Delineation Manual* (Ecology 1997).

On November 21st, 2006, potential wetlands were identified by visual inspection of site conditions, including the presence of hydrophytic vegetation, hydric soils, and evidence of wetland hydrology (inundation or soil saturation). Transects throughout the site were established to detailed vegetation, soils, and hydrology characteristics of the site; however, the boundaries of potential wetlands were not delineated or flagged. Transects were established approximately 100 feet apart, extending in a general north to south direction. At 50-foot intervals along the transect, a sample plot was dug to evaluate soils, vegetation, and hydrology. A wooden stake was placed at the location of the sample plot and identified with either pink or blue/white flagging whether it met wetland or upland criteria. Data forms were not filled out, as this was only the preliminary findings of the study. Approximately two-thirds of the site was evaluated utilizing this methodology.

## PRELIMINARY FINDINGS

Wetland boundaries at the Pacific Topsoils Inc. site have not been established; however, based on our field investigations to date, approximately two-thirds of the site would likely meet wetland criteria. Based on review of historic aerial photographs and findings of a buried peat layer, fill material has previously been placed on the site. Although fill material was historically placed on the site, the site conditions have been present for a duration long enough for wetland conditions to be present throughout a portion of the site. The Snohomish County soil survey shows Puget silty clay loam soils throughout the entire site. Puget silty clay loam soils are classified as hydric soils or have hydric characteristics.

The wetland and stream categories are presumed based on the preliminary reconnaissance observations, the categories may change following a more detailed wetland delineation and stream analysis.

A stream is located along the northern and western site boundaries. The stream flows within a well-defined, U-shaped channel. The stream channel is approximately five feet deep and four feet wide. Banks of the channel are predominately vegetated with shrubs and saplings. Common vegetation present is Himalayan blackberry, Evergreen blackberry, red alder and salmonberry. Common cattail and other herbaceous vegetation extend from the bank of the stream channel below the ordinary high water mark of the stream.

**Table 1. Preliminary Wetland Rating and Buffer Requirements**

	FWS Class <sup>1</sup>	Ecology Rating <sup>2</sup>	Snohomish County Category <sup>3</sup>	Snohomish County Buffer <sup>3</sup>	Dominant Vegetation
Wetland	PEMC	II	3	25 feet	Bentgrass, velvet grass, soft rush, meadow fescue, creeping buttercup
Stream			Type 3 <sup>4</sup>	100 <sup>4</sup>	

<sup>1</sup> U.S. Fish and Wildlife Service (FWS) wetland class (Cowardin et al. 1979).

<sup>2</sup> Hruby et al. (2004).

<sup>3</sup> Preliminary Snohomish County wetland category per SCC, §30.62.

<sup>4</sup> Presumed without anadromous fish use. Buffer width with anadromous fish use is 150 feet.

## APPLICABLE LAWS AND REGULATIONS

Several federal, state, and local regulations affect the development of wetland areas. Agencies having jurisdiction over development impacts associated with onsite wetland include, the U.S. Army Corps of Engineers, the Washington State Department of Ecology, and Snohomish County.

Regulatory agencies require that mitigation efforts follow this prescribed sequence:

- Avoiding the impacts altogether by not taking a certain action or parts of an action.

## TECHNICAL MEMORANDUM (CONTINUED)

- Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts.
- Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- Compensating for the impact by replacing, enhancing, or providing substitute resources or environments.
- Monitoring the impact and taking appropriate corrective measures.

### Federal

At the federal level, wetlands and streams are protected by Section 404 of the Clean Water Act (CWA), which regulates placement of fill in waters of the United States. The U.S. Army Corps of Engineers administers Section 404 of the Clean Water Act, which regulates the discharge of dredged or fill materials into waters of the United States, including wetlands. The U.S. Army Corps of Engineers must be notified regarding any alteration or filling of a wetland. The timing and nature of the notification can vary, depending on the specific project and applicable Nationwide Permit (NWP) or Individual Permit. An activity may be authorized under a NWP only if that activity and the applicant satisfy all of the NWPs terms and conditions. The project must meet both the national and regional conditions of the NWPs, including compliance with the Endangered Species Act, and any special conditions added to the permit for the project to be authorized under a NWP. *If the Corps finds that the proposed activity would have more than minimal individual or cumulative net adverse impacts on the environment, or may be contrary to the public interest, they may require a modification of the proposal to reduce or eliminate those adverse effects, or a standard individual permit may be required.* Nationwide Permit 39 – Residential, Commercial, and Institutional Developments, allows for the loss of up to 0.50 acre of non-tidal waters of the U.S. (wetlands), excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures.

Unless exempt from regulation, all projects involving fill in waters of the U.S., whether or not these waters are special aquatic sites, are required to evaluate "practicable alternatives" that would have less impact on the aquatic ecosystem. When an activity is proposed to occur in a special aquatic site (i.e. wetland fill) and it is not water dependent, the regulations presume that 1) practicable alternatives *that do not* involve special aquatic sites are available, and that 2) these alternatives will have less adverse impact on the aquatic ecosystem. Both of these presumptions must be clearly rebutted in writing by the applicant as a prerequisite to complying with the Section 404(b) (1) guidelines, and thus to potential permit issuance. Unless the applicant clearly demonstrates to the Corps that the proposal involving wetland fill is the least environmentally damaging practicable alternative, the 404(b) (1) guidelines prohibit the placement of fill material and the permit will be denied.

Compensatory mitigation may not be used as a method to reduce environmental impacts in the selection of the least environmentally damaging practicable alternatives for the purposes of requirements under the Corps guidelines. If it is determined that potential impacts have been avoided to the maximum extent practicable, the remaining unavoidable impacts will then need to be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts. Compensation for aquatic resource values can only be considered after impacts have been avoided and minimized to the greatest extent possible.

### State

Activities that affect wetlands and streams may also require a water quality certification (Section 401 of the CWA), which is implemented at the state level by the Washington State Department of Ecology

(Ecology). Ecology reviews projects for compliance with state water quality standards and makes permitting and mitigation decisions based on the nature and extent of impacts, as well as the type and quality of wetlands/streams being affected.

Additionally, any work or activity undertaken within shorelines of the State is subject to review under the Shoreline Management Act, 90.58 RCW. Such work or activity must be conducted in accordance with the requirements of the local Shoreline Management Program.

### Local

At the local level, Snohomish County regulations require assessment of critical areas for all development activities that may affect streams, wetlands, and buffers (SCC 30.62). Snohomish County is currently in the process of reviewing and updating these regulations. According to the 2006 Draft Snohomish County Wetland and Fish & Wildlife Habitat Conservation Areas Chapter 30.62A, wetland on the Pacific Topsoils Inc. site meets the criteria of a Category 3 wetland with a regulated 60 foot buffer. The stream adjacent to the northern and western site boundaries meets the criteria of a Type F stream, with a standard buffer width of 100. The stream buffer width with anadromous or resident salmonid presence is 150 feet.

Mitigation is required for loss of area or functional value of wetlands, streams, and buffers regulated under the Snohomish County Code. Under the current Snohomish County Code, wetland function and values shall be replaced in kind at a minimum ratio of one (replacement value) to one (existing value). According to the 2006 Draft Snohomish County Wetland and Fish & Wildlife Habitat Conservation Areas Chapter 30.62A, mitigation for Category 3 wetlands in the form of wetland creation is required at a 2:1 (created to impacted) ratio. Mitigation in the form of wetland enhancement for impacts to Category 3 wetlands is required at a 4:1 (enhanced to impacted) ratio. Enhancement is allowed in lieu of creation for up to one acre of wetland fill. Mitigation for impacts to the functions and values of wetlands, fish and wildlife habitat conservation areas and buffers shall be in-kind and on-site. Off-site mitigation may be approved only in those situations where appropriate and adequate on-site mitigation can not replace the functions of the wetlands, fish and wildlife habitat conservation areas or buffers at an equivalent level to the off-site location. Off-site mitigation must occur in the same sub-drainage basin for streams, lakes and wetlands.

### SUMMARY

The Pacific Topsoils Inc. expansion site is approximately 34.6 acres in size, of which 11.02 acres have been filled with non-native soils. According to preliminary field investigations by Parametrix, an approximately 15-acre wetland is located on the undisturbed portion of the site. Under the current Snohomish County Code, the wetland is regulated as a Category 3 wetland with a standard buffer width of 25 feet. Adoption of the proposed Snohomish County regulations would increase the wetland buffer width to 60 feet.

Without excavating the existing fill material, it is difficult to quantify how much, if any, of the 11.02 acres meets wetland criteria. If a portion of the site does meet wetland criteria, mitigation for these wetland impacts may be required on-site in accordance with local, state, and federal regulations.

If Pacific Topsoils should choose to explore filling additional areas on the site, mitigation would likely be required by U.S. Army Corps of Engineers, Washington State Department of Ecology, and Snohomish County. Given the existing acreage of wetland on the project site and mitigation ratio requirements, complying with local regulations to provide mitigation, in the form of wetland creation on-site for further wetland fill may be difficult to achieve.

### RECOMMENDATIONS

Parametrix recommends the following actions:

**TECHNICAL MEMORANDUM****PRELIMINARY**

Date: January 24, 2007

To: Jane Koler, Law Offices of Jane Ryan Koler

From: Andrea Gates, Parametrix

Subject: Pacific Topsoils, Inc. Smith Island Expansion Site Wetland Delineation and Impact Analysis

cc: Janusz Bajsarowicz, Pacific Topsoils, Inc.  
Becky Reininger, Parametrix  
Marti Louther, Parametrix  
Project File

Project Number: 555-5261-001 (02/0304)

Project Name: Pacific Topsoils, Inc. Smith Island Site Expansion Project

**INTRODUCTION**

Parametrix conducted wetland delineations on the Pacific Topsoils, Inc. (PTI) Smith Island Site Expansion site, located at 3000 West Smith Island Road, Marysville, Snohomish County, Washington (Section 05, Township 29 North, Range 05 East, Willamette Meridian). Smith Island is located south of Steamboat Slough and north of the Snohomish River, within unincorporated Snohomish County, Washington (Figure 1).

**PROJECT DESCRIPTION**

Grading and filling activities on a parcel owned by PTI (Parcel 29050500400400) were observed by Snohomish County on July 19, 2006. In a letter dated September 15, 2006, Snohomish County Planning and Development Services issued a Voluntary Correction Agreement to PTI for grading activities conducted without necessary permits and/or approvals on Parcel 29050500400400 (Figure 2). This letter stated that as a corrective action, all grading activities were to cease, and necessary permits and/or approvals are to be acquired for grading activities conducted in violation. Further, monetary penalties may be imposed by Snohomish County if the terms of the Voluntary Correction Agreement were not met per Snohomish County Code 30.85.260(2). Additionally, the Washington State Department of Ecology conducted a site visit in November 2006 to assess the site conditions.

PTI is proposing to expand soil processing operations at their existing Smith Island facility in Snohomish County to include 28 additional acres of adjacent land (portions of Snohomish County Tax Parcels: 29050500400400, 29050500400600, 29050500300600, and 29050500300200). The current soil processing operations is situated on 10.0 acres owned by PTI within the western part of Smith Island. The current facility is located almost entirely within unincorporated Snohomish County; however, a small portion is located within the city limits of Everett. The entire proposed expansion site is located within unincorporated Snohomish County (Figure 3).

**SCOPE OF SERVICES**

Parametrix was retained by PTI to identify and field-delineate (flag) wetlands located north and west of an existing on-site PTI facility on the following Snohomish County Tax Parcels: 29050500400400, 29050500400600, 29050500300600, and 29050500300200. Parametrix was further retained to review and define wetland boundaries that were filled from grading conducted in violation of the Snohomish County Code on Parcel 29050500400400 and identify preliminary mitigation options for potential wetland impacts.

10. Janusz Bajsarowicz testimony regarding the preliminary  
nature of the Parametrix study.



CROSS EXAMINATION

1  
2 BY MS. KOLER:

3 Q Mr. Bajsarowicz, what is your understanding about that  
4 technical memorandum that Parametrix did on  
5 January 24th, 2007?

6 A Was is my understanding of it?

7 Q Yes.

8 A Meaning --?

9 Q Well, was that a final determination, was it a  
10 preliminary determination; what kind of determination  
11 was that?

12 A That was a determination essentially for the area  
13 adjacent to the fill with preliminary information for  
14 the area underneath the fill, and I believe that final  
15 report -- at the time our owner was looking for  
16 mitigation information, and he was looking at  
17 purchasing some additional sites or working on some  
18 additional sites for pursuing the project that we were  
19 looking at at the time, which was that field project,  
20 that entire field.

21 Q Isn't it true that there had been no testing of the  
22 area beneath the fill?

23 A No, to that point I don't think there was any testing.

24 Q Isn't it true that Parametrix recommended that Pacific  
25 Topsoils do further testing of the area beneath the

1 fill?

2 A It is true that Parametrix recommended that, yeah.

3 Q Isn't it true that Parametrix warned Pacific Topsoils  
4 that its conclusions about the area beneath the fill  
5 were only preliminary?

6 A They did tell us that multiple times, yes.

7 Q Isn't it true that Parametrix even suggested that if  
8 you were to ever submit that preliminary report to any  
9 government agency, that you should have disclaimer  
10 language which indicated that the analysis of the area  
11 beneath the fill was tentative and preliminary?

12 A They did indicate that to us, and I think there was a  
13 disclaimer that was to be included with a letter, if  
14 that was to be submitted.

15 Q And isn't it true that earlier iterations of the  
16 Parametrix report concluded that they had no idea what  
17 was beneath the fill?

18 MS. MARCHIORO: Objection. Lack of  
19 foundation that Mr. Bajsarowicz has seen any earlier  
20 iterations.

21 JUDGE NOBLE: It does need foundation.

22 Q Mr. Bajsarowicz, did you see a memorandum that  
23 Parametrix did on December 24th, 2007?

24 A I have no idea.

25 Q Could you look at A-90, please.

1 A A-90, which is Exhibit 90?

2 Q That's correct.

3 A Yes, I see the technical memorandum.

4 Q Have you ever seen that technical memorandum before?

5 A I believe I have, yes.

6 Q Could you look on the last page and read the second

7 paragraph in the summary.

8 A (READING) Without excavating the existing fill

9 material, it is difficult to quantify how much, if

10 any, of the 11.02 acres meets wetland criteria. If a

11 portion of the site does meet wetland criteria,

12 mitigation for these wetland impacts may be required

13 on site in accordance with local, state and federal

14 regulations.

15 Q And did Parametrix reiterate this conclusion in

16 various e-mails that they sent to you?

17 A I think over both verbal conversations, e-mails and

18 various meetings we had with them, yes, they did.

19 There were multiple different forms of communication.

20 Q So Parametrix was attempting with a lot of energy to

21 urge upon Pacific Topsoils the proposition that they

22 needed to do further study of the area beneath the

23 fill?

24 MS. MARCHIORO: Objection. Calls for

25 speculation on what was in the mind of Parametrix.

1 JUDGE NOBLE: It does. That objection is  
2 sustained.

3 Q Did Pacific Topsoils understand from Parametrix that  
4 they needed to do further study of the area beneath  
5 the fill?

6 A That was indicated to us by Parametrix, yes.

7 Q And did Pacific Topsoils determine that it was going  
8 to do further study of the area beneath the fill?

9 A Yes, Pacific Topsoils did make that determination.

10 Q And did Pacific Topsoils hire Parametrix to help them  
11 do further study of the area beneath the fill?

12 A Yes, we did.

13 Q And did Parametrix coordinate drilling teams and  
14 activities that related to the further study of the  
15 fill?

16 A I believe they did, yeah. When we first began putting  
17 in piezometers and doing borings, they were basically  
18 the project manager for that, yes.

19 Q And isn't it true that the reason that Dr. Kelley came  
20 onto the team is that Parametrix no longer had a  
21 senior biologist on staff?

22 A Yes. We were told by Parametrix during a meeting, I  
23 don't know which meeting, but we were told that their  
24 senior biologist was leaving, and at that meeting with  
25 Parametrix, we were discussing how to continue doing

1 the monitoring that we were doing.

2 Q And the further study of wetlands was also considered?

3 A Yes. Actually, I think Marti suggested Dr. Kelley.

4 Q And so that's how Dr. Kelley came to join the team?

5 A Yes.

6 Q And so Pacific Topsoils, at Parametrix's suggestion,  
7 studied the area beneath the fill?

8 A That's correct.

9 Q And Pacific Topsoils declined to give the preliminary  
10 report to Ecology because it was preliminary; is that  
11 correct?

12 A We declined to give the report to Ecology because it  
13 was decided that further data needed to be collected  
14 underneath the fill.

15 JUDGE NOBLE: Excuse me. What was the last  
16 part of what you said?

17 THE WITNESS: Further data needed to be  
18 collected underneath the fill.

19 Q Do you remember exactly what Parametrix told you about  
20 this preliminary report that they did that's dated  
21 January 24th, 2007?

22 A I don't know what you mean by that, what they told me.

23 Q Can you tell us exactly what Marti Louter, the senior  
24 biologist who wrote that report, told you about that  
25 report?

---

1 MS. MARCHIORO: Objection. Hearsay.

2 Q Can you summarize exactly what she told you.

3 MS. MARCHIORO: Regardless, it's asking for  
4 an out-of-court statement to prove the truth of the  
5 matter asserted, and the individual who made the  
6 out-of-court statement is not going to be a witness at  
7 this hearing.

8 JUDGE NOBLE: That is true, but I previously  
9 stated that we have a somewhat relaxed hearsay  
10 standard, so I will allow that one answer.

11 MS. KOLER: Pardon?

12 MS. MARCHIORO: Can I ask, is it to the  
13 second one, the question summarizing what she told  
14 him, on exactly what she said?

15 JUDGE NOBLE: No, summarizing what she told  
16 him.

17 A When you say summarize what she told me, can you --

18 Q (Continuing by Ms. Koler) What did she tell you, you  
19 know, about her perceptions of that report?

20 JUDGE NOBLE: I maybe should elaborate on my  
21 ruling. I allowed that because you are inquiring into  
22 the area of why Pacific Topsoils did not send the  
23 wetland delineation report to Ecology, and the  
24 inquiry, I understood it to be, was what was the  
25 reasoning of Pacific Topsoils that was based upon this

1 one communication.

2 MS. MARCHIORO: And I guess it should be  
3 clear that Ms. Louthier is not the author of the  
4 report, in case that's been made less clear by some of  
5 the questioning and testimony.

6 JUDGE NOBLE: The questioning has to do with  
7 why Pacific Topsoils did not send it to Ecology.  
8 That's the only relevance that this question has.

9 MS. KOLER: Yes.

10 JUDGE NOBLE: So just a quick answer to that  
11 question would be allowed.

12 A We did not send that report to Ecology because I think  
13 that version of it was written basically to discuss  
14 mitigation, more so than anything for our owner's  
15 sake, trying to understand what kind of mitigation  
16 would be required, and I think the decision was made  
17 that we were going to do further analysis underneath  
18 the area where the material was.

19 Q (Continuing by Ms. Koler) Was Marti Louthier one of  
20 the biologists who wrote that report, Mr. Bajsarowicz?

21 A To my understanding, yes. I know Marti was heavily  
22 involved in the project.

23 Q Was she, in fact, the senior biologist at Parametrix?

24 A That is my understanding.

25 Q Mr. Bajsarowicz, did she warn you, give you any

1        warnings, about that report?

2    A    What do you mean?

3    Q    Well --

4                    JUDGE NOBLE: That goes beyond my ruling.  
5        We really are getting so far down the line on hearsay,  
6        what someone else thought about this report, that I  
7        think we're in danger of compromising the reliability  
8        of his testimony. So I did allow one question, no  
9        more.

10   Q    Mr. Bajsarowicz, you were concerned about mitigation,  
11        and why did you have that concern at that point in  
12        time?

13   A    Our primary concern for mitigation was that our  
14        owner's intention in that project was to be able to  
15        take that entire 35-acre field and as much as he could  
16        fill a good chunk of it, and he wanted to know how  
17        much land would be necessary for mitigational purposes  
18        to be able to pursue that type of a project.

19   Q    Mr. Bajsarowicz, did you have any understanding of  
20        wetland issues at the point in time that this  
21        situation arose?

22   A    What do you mean, did I have any understanding?

23   Q    Had you had any training or familiarity with wetlands?

24   A    No.

25   Q    Have you had any training in wetlands?



1 A No, but I've learned a lot through it.

2 Q Did you understand that it would be very difficult to  
3 fill a field that had wetlands?

4 A At the time, I did not, no.

5 Q And did you understand that -- you know, like you were  
6 very concerned with mitigation, were you not, with  
7 respect to the unfilled field project?

8 A Yeah. My primary concern was complying with the  
9 voluntary correction agreement and assuring that we  
10 had whatever was necessary to pursue the project that  
11 I was instructed to essentially work on.

12 Q And was a huge concern of yours getting a permit as  
13 fast as possible?

14 A Yeah. My primary goal was obviously meeting the  
15 voluntary correction agreement deadlines.

16 Q And what Parametrix was telling you about wetlands and  
17 that sort of thing, did that kind of sail on over your  
18 head?

19 MS. MARCHIORO: Objection. Vague, and  
20 relevance.

21 JUDGE NOBLE: I understand this is cross  
22 examination, but the witness is being led and --

23 MS. KOLER: Don't I have a right to lead on  
24 cross examination?

25 JUDGE NOBLE: You do, but he's also your

1 witness later in your case, so I think maybe it's not  
2 very helpful to put words in the witness's mouth, so  
3 perhaps you could clarify that question.

4 Q (Continuing by Ms. Koler) Did you understand based on  
5 your -- first of all, did you have any training in  
6 wetlands?

7 A No.

8 Q And before your job with Pacific Topsoils, where had  
9 you worked?

10 A In the environmental industry primarily in California,  
11 actually only in California.

12 Q What city in California?

13 A I worked in Southern California.

14 Q Do they have wetlands in Southern California?

15 A I'm sure in areas they do, but I didn't work on any  
16 projects.

17 Q So did you understand the advice that Parametrix was  
18 giving to you about the filling of wetlands?

19 A From reading -- I guess I'm confused. The advice  
20 Parametrix was giving me?

21 Q When they were talking about your proposal to fill the  
22 unfilled field, did they think that was an easy  
23 project to permit?

24 A No. I think that they were always trying to  
25 essentially get a message to our management about how

1 involved that project would become, how entailed that  
2 project would be.

3 Q Do you think that you fully understood what they were  
4 telling about the difficulty of that project because  
5 of your lack of training?

6 A I don't think I had an understanding that you could  
7 not do that type of a project at that time.

8 Q Okay. I'd like you to take a look at A-91, please.  
9 Can you tell me what that is.

10 A It's an e-mail from Marti to myself.

11 Q Okay. And what recommendation does this e-mail make  
12 to you?

13 A The message that this e-mail is giving to us is  
14 essentially that if we were planning on submitting  
15 what Parametrix has done up to this date in their  
16 report, that we needed to include this language in  
17 either a cover letter or the report or somewhere.

18 JUDGE NOBLE: Excuse me. What exhibit  
19 number are you on?

20 MS. KOLER: A-91.

21 JUDGE NOBLE: Thank you.

22 MS. KOLER: I'd like to offer A-91 into  
23 evidence if I could.

24 JUDGE NOBLE: Is there an objection to A-91?

25 MS. MARCHIORO: No.

1 JUDGE NOBLE: A-91 is admitted.

2 MS. KOLER: I would also like to ask the  
3 Board to admit into evidence Exhibit 90, the  
4 Parametrix technical memorandum dated December 4,  
5 2006.

6 JUDGE NOBLE: Was there an offer of Exhibit  
7 R-19?

8 MS. MARCHIORO: Yes, I'd be happy to make  
9 that offer. He identified it and indicated that it  
10 was sent to him.

11 JUDGE NOBLE: He did. I'm going to admit  
12 both Exhibit A-90 and R-19.

13 MS. KOLER: I guess we would like to object  
14 to admitting the -- well, I guess we won't.

15 And you admitted A-91, just to clarify; is that  
16 correct?

17 JUDGE NOBLE: Yes.

18 MS. KOLER: Okay.

19 Q (Continuing by Ms. Koler) There's one other thing I  
20 would like you to take a look at, Mr. Bajsarowicz.  
21 I'd like you to look at Exhibit A-99, please -- 89.

22 A A-99?

23 Q A-89.

24 A Okay.

25 Q Could you read --

1 A Hang on.

2 Q Pardon?

3 A I have to find it. I don't seem to have it. 89?

4 Q A-99.

5 A 99?

6 Q 89, I'm sorry, 89.

7 A I don't have 89.

8 MS. MIX: It's in the other notebook.

9 A Okay. I have it.

10 Q Could you tell me what this is.

11 (PAUSE IN PROCEEDINGS WHILE  
12 WITNESS REVIEWING DOCUMENT.)

13 A It's an e-mail originally from Becky Reininger to  
14 myself, and then I responded back to Becky.

15 Q And could you read the section that's in brackets that  
16 says "With regard --"

17 JUDGE NOBLE: Excuse me. This is Exhibit  
18 A-89?

19 MS. KOLER: That's correct.

20 JUDGE NOBLE: Which is the subject of the  
21 motion in limine, and I reserved ruling on that.

22 MS. KOLER: Oh, excuse me. Okay.

23 MS. MARCHIORO: And I don't think we had an  
24 opportunity to report back to the Board. I had an  
25 opportunity to speak to Mr. Bajsarowicz over the

1 break, and while I will withdraw my motion in limine  
2 with respect to those six exhibits, I am reserving my  
3 right to interpose objections to those documents.

4 JUDGE NOBLE: I see.

5 MS. MARCHIORO: In terms of evidentiary  
6 objections.

7 JUDGE NOBLE: Yes.

8 MS. KOLER: And I apologize, Judge Noble.  
9 We had decided that in the hallway and --

10 JUDGE NOBLE: That's all right. I'm up to  
11 speed now.

12 A So what would you like me to do?

13 Q (Continuing by Ms. Koler) The section that's in  
14 brackets, "With regard to your question...", if you  
15 would read that for us, please, Mr. Bajsarowicz.

16 A (READING) With regard to your question of whether we  
17 are able to determine if it is in fact wetlands that  
18 were already filled, the memo states without  
19 excavating the existing fill material, it is difficult  
20 to quantify how much, if any, of the 11.02 acres of  
21 area meets wetland criteria.

22 MS. KOLER: I'd like to ask that that  
23 exhibit be admitted into evidence.

24 MS. MARCHIORO: And Ecology would object  
25 from the standpoint of, in my discussion with

1 Mr. Bajsarowicz, he indicated that he did not make any  
2 markings on the document. Therefore, it would be  
3 inappropriate to put that document into evidence with  
4 some level of highlighting that's not in the original.

5 JUDGE NOBLE: I think the Board is able to  
6 overlook the highlighting, and so Exhibit A-89 will be  
7 admitted.

8 Q (Continuing by Ms. Koler) And to the best of your  
9 knowledge, nothing has changed on the property after  
10 this e-mail from Ms. Reininger?

11 A What do you mean, nothing has changed on the property?

12 Q No further testing was done by Parametrix before they  
13 did the iteration of the report, the January 24th  
14 report?

15 A No further --

16 Q -- testing of the area beneath the fill was done by  
17 Parametrix?

18 A There was no testing of the area underneath the fill  
19 until whenever that started, February or March of  
20 2007; I don't remember when it was, but there was no  
21 testing underneath the fill until that time.

22 Q Thank you.

23 MS. KOLER: I have no further questions.

24 JUDGE NOBLE: Redirect?

25 MS. MARCHIORO: Yes, I do have a few

11. Ecology Shoreland and Wetland Assistance Supervisor

Stockdale's testimony that Dr. Kelley's study is the only study which analyzed the area beneath the fill.



Stockdale

1 MS. KOLER: We're on page 84 for this  
2 deposition.

3 Q (READING) QUESTION: With respect to the filling of  
4 wetlands -- let's see.

5 Let's just go on to another question and then  
6 we'll come back to that.

7 As far as you know, Dr. Kelley's study was the  
8 only effort that has been made to look at wetland  
9 conditions at the site; is it not?

10 A I'm sorry. Can you restate that again, please?

11 Q As far as you know, is Dr. Kelley's study the only  
12 effort that has been made to look at wetland  
13 conditions at this site?

14 A No.

15 Q Okay. I'd like you to look at your deposition  
16 testimony or I'd like to refresh your memory about  
17 your deposition testimony, page 49, lines 21 and 22.

18 A What exhibit number is that?

19 Q It was an appendix to the brief, but I don't think we  
20 have appendices now.

21 Okay. So the question I asked you is:

22 (READING) QUESTION: Because, like, to date,  
23 unless I'm missing something, isn't Dr. Kelley's study  
24 the only study of the area beneath the fill?

25 That was the question I asked you. And your

1 answer is:

2 (READING) As far as I know, it's the only effort  
3 that has been made to look at wetland conditions on  
4 the site.

5 A Okay. On the site or beneath the fill?

6 Q On the site. No, the area beneath the fill. The  
7 question was:

8 (READING) Mr. Stockdale, because to date, unless  
9 I'm missing something, isn't Dr. Kelley's study the  
10 only study of the area beneath the fill?

11 And your response was:

12 (READING) As far as I know, it is the only  
13 effort that has been made to look at wetland  
14 conditions on the site.

15 Was that your response that you made under oath  
16 on October 31st?

17 A I believe so.

18 Q And do you recall telling me on October 31st that a  
19 preliminary step in characterizing the area beneath  
20 the fill was to sample that area?

21 A Yes.

22 Q And do you recall telling me that as of October 31st,  
23 2007, that in your opinion Dr. Kelley's study was the  
24 only study of the area beneath the fill?

25 MS. MARCHIORO: Objection. Asked and

1 answered. And the first time it was asked, she  
2 changed it when she referred to the deposition  
3 transcript, so Mr. Stockdale's testimony appears to be  
4 inconsistent when it's not.

5 JUDGE NOBLE: Well --

6 MS. KOLER: I was going to say this has not  
7 been asked and answered. This is a separate question.  
8 One question, just to clarify, was about Dr. Kelley's  
9 study being the only effort made to look at wetland  
10 conditions under the fill, and then this other  
11 question was in his opinion his study was the only  
12 study of the area beneath the fill.

13 JUDGE NOBLE: Well, we're burning up time  
14 here, and I made a note on that first question of  
15 whether it was the first effort to look at wetlands at  
16 the site, and it seems like the confusion here has to  
17 do with either beneath the fill or at the site, so a  
18 nice precise question would be good so we're sure the  
19 witness knows what he's answering.

20 MS. KOLER: Okay. Well, shoot, let me do  
21 this again so I'm not confusing the witness.

22 Q (Continuing by Ms. Koler) So you stated that  
23 Dr. Kelley's study was the only study of the area  
24 beneath the fill; is that correct?

25 A That's correct.

12. Ecology Shoreland and Wetland Assistance Supervisor

Stockdale's testimony that Dr. Kelley's study is the only study which analyzed the area beneath the fill.

1 Q And you testified that Dr. Kelley's study was the only  
2 effort that had been made to look at wetland  
3 conditions at the site; is that correct?

4 A Well, it's not the only study at the site. It's the  
5 only study that has looked at wetland conditions  
6 underneath the fill.

7 Q Didn't you testify, though, at your deposition that it  
8 was the only study that's been made of wetland  
9 conditions at the site?

10 A Well, I think it gets to what I believe was the  
11 question that you were asking me.

12 Q Can I just show you this to refresh your recollection?

13 JUDGE NOBLE: Could you let the witness  
14 answer? And, again, you're really burning up time, so  
15 I think if we just let him answer, we can move on.

16 A So, Ms. Koler, if your question during my deposition  
17 and right now is if Dr. Kelley's study was the only  
18 study looking at conditions under the fill, that is  
19 correct.

20 But if your question was whether it was the only  
21 study looking at conditions on the entire site, I  
22 would say no, because there had been other studies.

23 Q Do you want to just read the answer that I gave to  
24 you, I questioned you, I said here, if you'll look at  
25 the question, read the question, and then read the

1 answer. And this is on page 49 beginning at line 18,  
2 please.

3 MS. MARCHIORO: And I'd ask that you go  
4 ahead and read both of those into the record,  
5 Mr. Stockdale.

6 Q So, Mr. Stockdale, if you just start here, line 18.

7 A So line 18.

8 Q And that's a question.

9 A The question:

10 (READING) Because, like, to date, unless I'm  
11 missing something, isn't Dr. Kelley's study the only  
12 study of the area beneath the fill?

13 ANSWER: As far as I know, it is the only effort  
14 that has been made to look at wetland conditions on  
15 the site.

16 Q Thank you.

17 And Dr. Kelley -- excuse me, Mr. Stockdale -- on  
18 that occasion, did you also testify that Dr. Kelley's  
19 continuing analysis would help Ecology figure out, to  
20 the best that you could, the extent of the vegetation  
21 that's occurred on the site?

22 A That's correct.

23 Q And did you tell me on that occasion that a  
24 preliminary step in characterizing the area beneath  
25 the fill was to sample the area --

1 MS. MARCHIORO: Objection.

2 Q -- under the fill?

3 MS. MARCHIORO: Asked and answered.

4 A The extent under the fill?

5 Q To sample the area under the fill. But she's  
6 objected, so now Judge Noble has to rule.

7 JUDGE NOBLE: What is your response to that?

8 MS. KOLER: My response is, I don't think  
9 I've asked it, you know. I have not asked it. And  
10 I've never asked him a question about whether it was  
11 necessary to sample the area beneath the fill, and  
12 since there's been --

13 JUDGE NOBLE: So you're asking him if he  
14 feels it's necessary to sample the area under the  
15 fill?

16 MS. KOLER: As a preliminary step to  
17 characterizing the area. I think that's pretty  
18 fundamental in this case because --

19 JUDGE NOBLE: I'll let him answer the  
20 question.

21 A Well, sampling under the fill would provide you more  
22 information about the extent of the conditions before  
23 they were filled.

24 Q Thank you.

25 MS. KOLER: No further questions.

12. Testimony of Ecology employee Anderson that he has no idea what is beneath the fill and that it is impossible to characterize that area without fill removal.



1 approximately here.

2 Q All right.

3 A That's the northern lobe of the fill, and there may be a small  
4 portion of the unfilled area that overlaps with that wetland.

5 Q Okay. So the fill would have been placed on top of the  
6 wetland; is that right?

7 A Yes.

8 Q So then to determine definitively whether or not a wetland  
9 existed there, what would need to be done to make that  
10 determination?

11 A The fill would need to be removed, and I think the area would  
12 need to sit idle for a year, maybe longer, so that the  
13 vegetation and hydrology would have some chance of  
14 reestablishing. And then a delineation should be done at that  
15 time.

16 Q So again, you would look at the vegetation, the hydrology, and  
17 the soils?

18 A That's correct.

19 Q Okay. You indicated that you were out on site in the fall of  
20 2006. Does it matter when a site evaluation is done if it's  
21 done in the fall, the spring, or the summer?

22 A It can influence the presence of water, the hydrology.  
23 Typically during the summer, such as now into October/November,  
24 depending on when the rains return, you may not have the  
25 presence of water to meet the hydrology criteria. And in that

1 Q And that would be an evaluation of the soils and the vegetation  
2 and whether or not there was any water. Is that accurate?

3 A I don't know that they looked at soils on the site. What you  
4 can do is you can look on one portion of a site, characterize  
5 the conditions in detail. And then if you have similar  
6 vegetation on another portion of the site, say this looks  
7 similar, therefore, we believe this is also wetland.

8 MS. ANDERSON: Okay. Thank you. Nothing further.

9 HEARING EXAMINER: Thank you. All right. It's noon.

10 MS. KOLER: I was just going to ask him a couple of  
11 questions. But should I do it after --

12 HEARING EXAMINER: No. Do it now.

13 RECROSS EXAMINATION

14 BY MS. KOLER:

15 Q Mr. Anderson, you didn't do any boring so that you were looking  
16 down in the area of the fill, did you?

17 A I did not.

18 Q And you were doing your explorations at the periphery of the  
19 fill, were you not?

20 A That's correct.

21 Q So you really don't have any idea what's beneath the fill, do  
22 you?

23 A No.

24 Q So you're assuming that because there was some wetlands, some  
25 scattered wetlands, on the periphery of the fill, that they

1 were also beneath the fill?

2 A That's correct, based on my site visit and the previous  
3 information that I had reviewed.

4 Q And you actually don't know -- and you do remember telling me  
5 that the hydrology at that site was uncertain?

6 A I remember telling you that the soil wasn't saturated at the  
7 time that I was on the site. But there was enough moisture in  
8 the soil that I believe delineation was required. The soil was  
9 not dry.

10 Q And do you also remember that when I called you, you know, to  
11 speak to you -- you know, what was being done on the site and  
12 so on, you directed me to speak to an attorney from the  
13 Attorney General's office, did you not?

14 A That's correct.

15 Q So that's probably why you haven't been getting reports from me  
16 about the progress of wetland delineation; is that correct?

17 MS. ANDERSON: Objection. Asking the witness to  
18 speculate --

19 HEARING EXAMINER: Sustained.

20 THE WITNESS: I spoke to Mr. Bajsarowicz --

21 HEARING EXAMINER: Sustained. Sustained.

22 MS. ANDERSON: I have no further questions. Thank  
23 you.

24 HEARING EXAMINER: See, we're both lucky. All right.  
25 It's noon. Do you have another witness?

13. Ecology employee Anderson's testimony that Ecology failed to comply with RCW 90.48.120.

1 and penalty, and during the period immediately before  
2 issuing the order and penalty, I did spend a fair  
3 amount of my time on this project, yes.

4 Q So you didn't tell me that you spent between 20 and 50  
5 percent of your time?

6 A As I recall, your question related to a specific  
7 portion of the enforcement action, and that's what I  
8 was responding to, if I'm recalling correctly.

9 Q While we're looking for that, we'll come back to that  
10 in a minute. I don't want to be burning up our time  
11 in that way.

12 Mr. Anderson, isn't it true that this penalty  
13 action was commenced under the Water Pollution Control  
14 Act?

15 A That is true.

16 Q Mr. Anderson, I'd like you to just read 90.48.120,  
17 subsections (1) and (2), to just kind of orient  
18 ourselves here.

19 A Is there an exhibit, or do I proceed?

20 Q You can just read that.

21 A 90.48.120?

22 Q That's correct.

23 A This is Title 90 RCW, water rights environment,  
24 90.48.120:

25 (READING) Notice of department's determination

1 that violation has or will occur, report to department  
2 of compliance with determination order or directive to  
3 be issued - Notice.

4 (1) Whenever in the opinion of the department any  
5 person shall violate or creates a substantial  
6 potential to violate the provision of this chapter or  
7 Chapter 90.56 RCW or fails to control the polluting  
8 content of waste discharged or to be discharged into  
9 any waters of the state, the department shall notify  
10 such person of its determination by registered mail.  
11 Such determination shall not constitute an order or  
12 directive under RCW 43.21B.310.

13 Within 30 days from the receipt of notice of such  
14 determination, such person shall file with the  
15 department a full report stating what steps have been  
16 and are being taken to control such waste or pollution  
17 or to otherwise comply with the determination of the  
18 department, whereupon the department shall issue such  
19 order or directive as it deems appropriate under the  
20 circumstances and shall fully notify such person  
21 thereof by registered mail.

22 That's the text that's highlighted. That's what  
23 I'm to read?

24 Q Well, let's pause there for a moment.

25 Now, isn't it true that the department did not

1 proceed under that notification statute and they  
2 didn't notice Pacific Topsoils by registered mail and  
3 request that they come forward and provide  
4 information?

5 A The order and penalty were sent out by registered  
6 mail.

7 Q I'm asking you if, before sending out the order and  
8 penalty, you gave Pacific Topsoils notice under  
9 90.48.120, subsection (1).

10 A I notified Mr. Rajsarowicz --

11 Q Answer my question yes or no. Did the Department of  
12 Ecology by registered mail send out to the owners of  
13 Pacific Topsoils notice that a penalty was being  
14 considered and give them an opportunity to come  
15 forward and provide information?

16 A No.

17 Q Okay. Go on and read the next section of that  
18 immediate action, please.

19 A The subparagraph (2) or subsection (2)?

20 Q Yes, please.

21 A Subsection, I guess, (2), paragraph 2:

22 (READING) Whenever the department deems  
23 immediate action is necessary to accomplish the  
24 purposes of this chapter or Chapter 90.56 RCW, it may  
25 issue such order or directive as appropriate under the

1 circumstances without first issuing a notice or  
2 determination pursuant to subsection (1) of this  
3 section.

4 Q You can stop reading there.

5 So, Mr. Anderson, Ecology determined in this case  
6 that immediate action was necessary; is that correct?

7 A We determined that the violation should be resolved.

8 Q But because you didn't go by the notice provisions in  
9 90.48.120, subsection (1), Ecology deemed that  
10 immediate action was necessary?

11 A We proceeded under the advice of our senior management  
12 and Ecology enforcement staff.

13 Q Could you read 90.48.240 to us.

14 A 90.48.240, Water pollution orders for conditions  
15 requiring immediate action - Appeal:

16 (READING) Notwithstanding any other provisions  
17 of this chapter or Chapter 90.56 RCW, whenever it  
18 appears to the director that water quality conditions  
19 exist which require immediate action to protect the  
20 public health or welfare or that a person required by  
21 RCW 90.48.160 to obtain a waste discharge permit prior  
22 to discharge is discharging without the same or that a  
23 person conducting an operation which is subject to a  
24 permit issued pursuant to RCW 90.48.160 conducts the  
25 same in violation of the terms of said permit, causing



1 water quality conditions to exist which require  
2 immediate action to protect the public health or  
3 welfare, the director may issue a written order to the  
4 person or persons responsible without prior notice or  
5 hearing directing and affording the person or persons  
6 responsible the alternative of either:

7 (1) Immediately discontinuing or modifying the  
8 discharge into waters of the state; or (2) appearing  
9 before the department at the time and place specified  
10 in said written order for the purpose of providing to  
11 the department information pertaining to the  
12 violations and conditions alleged in said written  
13 order.

14 Q Mr. Anderson, did Ecology send out notice to Pacific  
15 Topsoils under this immediate action section and give  
16 them an opportunity to come forward and provide  
17 information to Ecology or to immediately cease the  
18 discharge?

19 A Well, we issued an order and penalty and asked them to  
20 remove the fill.

21 Q But did you give them the opportunity to choose  
22 between those two alternative forms of action and to  
23 either come forward and provide information to Ecology  
24 after due notice or to immediately discontinue the  
25 discharge?

1 MS. MARCHIORO: Objection. Lack of  
2 foundation that Mr. Anderson utilizes this particular  
3 statute in his work.

4 JUDGE NOBLE: Your question does include an  
5 assumption, and so there isn't a foundation about  
6 that. We don't know, maybe he does. We should ask.

7 Q Well, I guess, Mr. Anderson, you issue penalty orders  
8 in your work, do you not?

9 A Yes.

10 Q And in this case two penalty orders were issued by  
11 Ecology, were they not?

12 A No. One penalty was issued and one order was issued.

13 Q And presumably such penalties should have been done in  
14 accord with the provisions in the Water Pollution  
15 Control Act, should they not?

16 A I believe so.

17 Q And so I'm asking you now, did you provide notice, the  
18 sort of notice to Pacific Topsoils and the  
19 opportunity, the two options that are indicated when  
20 immediate action is necessary?

21 A Well, I told them that they needed to provide a  
22 delineation. I was waiting for them to do that. We  
23 would have discussed the --

24 Q Mr. Anderson, I'd like you to answer my question yes  
25 or no. Did you provide notification --

14. Ecology employee Anderson's testimony fact that PTI did not produce wetland delineation when he demanded it a significant factor in decision to impose penalty.

1       you --

2                   MS. KOLER: I've forgotten what the question  
3       was.

4                   JUDGE NOBLE: You asked him if Pacific  
5       Topsoils was provided an opportunity to communicate  
6       with Ecology or make some choice that you saw in the  
7       statute, and he was talking about his communications  
8       with Pacific Topsoils prior to the issuance of the  
9       order. And I would just like to know if he was  
10      finished with his answer.

11                  MS. KOLER: Oh, okay.

12                  THE WITNESS: I was not.

13    A    (Continuing) What I had started to say was I was in  
14       communication with Mr. Bajsarowicz as an agency, and  
15       personally we would prefer to resolve these issues  
16       informally, not issue orders and penalties, and work  
17       cooperatively with the property owner.

18                I didn't feel that that was the case. I was  
19       operating on a good faith basis in October, when I met  
20       with Mr. Bajsarowicz, and by late December I was  
21       beginning to be concerned that they weren't operating  
22       with that same premise. When I didn't receive the  
23       delineation report in mid January, it was clear that  
24       we needed to step this up to formal enforcement.

25    Q    (Continuing by Ms. Koler) Thank you.

1        were saying, "We've got to pursue this as quickly as  
2        possible"?

3        A    You're referring back to the November 29th e-mail?

4        Q    Yes, I am.

5        A    And, I'm sorry, you're saying that my knowledge was I  
6        didn't understand what was under the fill, therefore  
7        we have to proceed quickly?

8        Q    My question is, you didn't know what was under the  
9        fill, you had seen no study establishing what was  
10       under the fill?

11       A    I had the National Wetlands Inventory and the soil  
12       survey which identified wetlands on the site. The  
13       soil survey intersected on an aerial photograph with  
14       the fill, and then the fill was shown intersecting  
15       with the wetland. I was convinced that the fill had  
16       been placed in wetlands.

17       Q    But it was a judgment on your part; there was no  
18       actual evidence of what was under the fill?

19       A    Judgment is part of my job, and all of the wetland  
20       guidance documents discuss using best professional  
21       judgment when in the field.

22       Q    Now, isn't it true you told me after that October 27th  
23       site visit that you had enough knowledge to demand a  
24       wetland delineation?

25       A    I don't remember saying that, and I don't remember

1 demanding a delineation.

2 Q Didn't you ask Pacific Topsoils to perform a wetland  
3 delineation on that occasion?

4 A I did ask. Ask and demand are two different terms.

5 Q And you told me you had not yourself done a wetland  
6 delineation on that 20-to-30-minute site visit?

7 A That's correct. I've never maintained I did a  
8 delineation.

9 Q You told me that you had simply gathered enough  
10 information to believe that a wetland delineation was  
11 necessary?

12 A That's correct.

13 Q Now, isn't it true that there's quite a gap between  
14 saying, "We need a wetland delineation," and imposing  
15 an \$88,000 penalty?

16 A I'm not sure what a gap is.

17 Q Well, when you penalize someone, for example, if you  
18 get a speeding ticket, the officer is saying, "I saw  
19 you speeding"; isn't that true?

20 A That's correct.

21 MS. MARCHIORO: Objection. Well, I'll let  
22 it go. He answered.

23 Q Isn't it true that when Ecology issued this penalty  
24 order, it didn't have actual evidence about the area  
25 beneath the fill and it didn't have actual evidence

1       It was usually a couple weeks.

2               Once you make your initial site visit, you  
3       typically put together a brief sketch and a writeup.  
4       You could potentially tell the client within a day or  
5       two what your findings were, maybe get a draft memo  
6       out the next week. So within a month or two, you  
7       should be able to have stuff done.

8   Q   So did you need the wetland delineation from  
9       Parametrix to support your conclusion that enforcement  
10      action was merited?

11   A   Well, if we had received the -- I guess the short  
12      answer is no. If we had received the delineation,  
13      typically what would happen is we'd have a site visit  
14      with the property owner and their consultant, and we  
15      would verify the boundary in the field and look at it,  
16      talk about it: Maybe this flag moves over here, maybe  
17      it's fine.

18               But we were never provided that opportunity. And  
19      had we received it, I don't think we would have  
20      proceeded with formal enforcement. I can't say for  
21      sure, but the fact that we didn't receive it, and I  
22      was informed that the report was done, was something  
23      we considered.

24   Q   In January?

25   A   Correct.

15. Testimony of Ecology employee Anderson that he did not  
perform a wetland delineation.



1       October 27th site visit.

2   Q   And what did you document on your site visit in your  
3       field notes?

4   A   I documented the general field conditions, listed some  
5       species. It was a little uneven to walk on, so I  
6       thought possibly the site had been disked at some  
7       time.

8               And then I also describe the soil color, the fact  
9       that there were mottles at 10 inches, and the color of  
10      the mottles or redoximorphic features. The soil was  
11      moist but not wet at 12 inches, and there was  
12      occasional patches of spirea rows in unmowed areas.  
13      The reed canary grass and the spirea were dominant --  
14      those are wetland plants, wetland communities -- and on  
15      the north side of the fill, rills were visible, and I  
16      also saw concrete and wood and what appeared to me to  
17      be construction debris.

18   Q   Did you reach any conclusions regarding the site  
19       during your site visit?

20   A   Yes, I did.

21   Q   What were those conclusions?

22   A   I concluded that there were wetlands on site, fill had  
23      been placed in wetlands and that a delineation needed  
24      to be done.

25   Q   Do any of the manuals or guidance documents that you

1 A Yes.

2 Q Because you relied on rhizospheres which are at the end  
3 of the list, No. 7, seven out of ten, did you reevaluate  
4 the parameter to ensure that the proper decision was  
5 reached?

6 A I asked Pacific Topsoils to, and they never provided the  
7 information.

8 Q I'm sorry. You haven't gotten Dr. Kelly's report; is  
9 that correct?

10 A I got Dr. Kelly's report. I did not receive the  
11 Parametrix report, which their biologist stated that  
12 wetlands were found, and I asked Pacific Topsoils to do  
13 a delineation. My purpose was not to do a detailed  
14 delineation. |||||

15 I visited the site to determine whether I thought  
16 there was sufficient evidence to ask for a delineation  
17 and that wetlands had been filled, which is what I did. X

18 Q Did you observe that there were facultative species of  
19 plants at the site?

20 A I would have to look at my plant list. I think one or  
21 two of the species may be listed as facultative and some  
22 of the grasses maybe.

23 Q Certainly there were a lot of grasses on the site.

24 A Yes.

25 Q So in some areas that were grassy areas, there were

1 A It may be a manifestation of past agricultural activity.  
2 From a regulatory perspective, that doesn't necessarily  
3 mean the site would be viewed as agricultural land.

4 Q Well, these lands that Pacific Topsoils' property is  
5 located on, they certainly have been influenced by human  
6 activity, such as agriculture, have they not?

7 A They have been influenced. Agriculture is one of the  
8 influences.

9 Q And you can't take that out of the equation when you  
10 look at them, can you?

11 A I found wetland vegetation and wetland soils on the  
12 periphery of the fill and felt I had sufficient evidence  
13 to request a delineation.

14 Q But did you factor in to your analysis that this site  
15 has been disturbed by drainage facilities and so on?

16 A I'm not aware of drainage -- functional drainage  
17 facilities on the site.

18 Q You don't think the dikes have an effect on Pacific  
19 Topsoils' site?

20 A I would not define a dike as a drainage facility.

21 Q Water control facility?

22 A A dike is a form of a water control facility.

23 Q And the tidal gate and the dikes are influencing  
24 activities or conditions on the Pacific Topsoils' site,  
25 are they not?

1 A I'm not sure what a "facility" is.

2 Q (By Ms. Koler) A dike is a facility, is it not?

3 A I wouldn't describe it as a facility. As I and  
4 Mr. Stockdale have said repeatedly, the dikes would  
5 reduce the amount of flooding on the property, but it  
6 doesn't necessarily mean that wetland soils and wetland  
7 hydrology aren't present.

8 Q But it could?

9 A It could.

10 Q I mean, clearly it could, couldn't it?

11 A It could it; it could not.

12 Q And tide gates, same thing, couldn't it?

13 A Tide gates generally would reduce the amount of water on  
14 the site. Whether it reduces it below the threshold to  
15 meet a wetland, I don't know.

16 Q Drainage tiles?

17 A Drainage tiles could. I would expect that drainage  
18 tiles that had not been maintained for 24 years would  
19 have little or no effect.

20 Q Pipes?

21 A I'm not aware of pipes. Pipes potentially could. Pipe  
22 on top of the ground wouldn't have any effect on  
23 hydrology.

24 Q Pipes in ditches and so on would, would they not?

25 A I'm not clear where the pipe is or what the purpose is.

1 the wetlands under the fill?

2 A They used a methodology that I think is a standard of  
3 practice in wetlands delineation. And maybe, if I  
4 could, it would be easiest if I demonstrate for the  
5 Board.

6 You've got an area, you can look on an aerial  
7 photograph, you can see what this looks like. It's  
8 got certain characteristics, color, whatever. If you  
9 place something on top of it, now you can see that,  
10 well, some of it is obscured, but you can go back and  
11 look at the site conditions along the edge of this  
12 feature and determine that they're consistent with  
13 features outside the book and that from looking at  
14 aerial photographs or looking at the table before, I  
15 can infer that tabletop underneath the book is similar  
16 to the tabletop, you know, in and out.

17 What Parametrix did is they did transects across  
18 the site, which included going from unfilled portions  
19 of the site across the fill, unfilled portions of the  
20 site, again, similar to what I described with this  
21 illustration.

22 Q Now, is this consistent with your analysis?

23 A It's a more detailed analysis. What they did was a  
24 delineation. I never went on the site to do a  
25 delineation. I went on the site just to determine if

16. Testimony of Ecology Shoreland Supervisor Stockdale that  
this is first wetland penalty Ecology has imposed under  
WPCA.

1       filling penalty that I'm aware of or that I've been  
2       involved in at Ecology.

3   Q   And how long have you been at Ecology? I know you told  
4       me earlier but I forgot.

5   A   Actually, I didn't tell you. I've been with the  
6       Department of Ecology for 15 years.

7   Q   Okay. So as far as you know, in that 15 years, this  
8       would be the only wetland-filling penalty that would  
9       have gone to the Pollution Control Hearings Board?

10  A   That's correct.

11  Q   And when you're enforcing like a spill, you know what  
12       definitely happened. I mean, you see oil in the water;  
13       is that correct?

14  A   Well, I'm not in the oil-spill program.

15  Q   Okay. But I guess I'm concerned about just  
16       understanding how Pacific Topsoils got a penalty as  
17       opposed to a warning or as opposed to an order saying,  
18       "Go and get a wetland delineation," or "Go get us a  
19       wetlands study." How did Ecology just leapfrog forward  
20       and give them this penalty?

21               MS. MARCHIORO: Objection: asked and answered  
22       numerous times earlier in the deposition, and I would  
23       not want Mr. Stockdale to be asked to go back over what  
24       I would say was half an hour to 45 minutes of his prior  
25       testimony.

1 A It's a different case.

2 Q Did it seem to have any bearing on this case?

3 MS. MARCHIORO: I'd interpose the same  
4 objection.

5 Q (By Ms. Koler) You can go ahead and answer.

6 A It's a different case.

7 Q It's a different case, but I'm asking you if you  
8 personally believe -- not your attorney but you -- that  
9 it has any relevance to the present case.

10 A I don't know. I don't.

11 Q Well, just think about it for a minute and tell me.

12 A (No response.)

13 Q I think while you're thinking about that, we'll come  
14 back to that. You told me that this \$88,000 penalty  
15 imposed on Pacific Topsoils was a pretty big penalty for  
16 the filling of wetlands. As far as you know in the past  
17 several years, what larger penalties have been imposed?

18 A By the agency?

19 Q By the agency.

20 A I don't know. Well, we've levied fines against people  
21 that have done oil in Puget Sound. I would have to look  
22 at the enforcement documents. There's a lot of  
23 different penalties that are assessed by the agency.

24 Q With respect to the filling of wetlands?

25 A Well, as I mentioned earlier, this is the only wetland-



1 [ filling penalty that I'm aware of or that I've been  
2 involved in at Ecology. ] X2

3 Q And how long have you been at Ecology? I know you told  
4 me earlier but I forgot.

5 A Actually, I didn't tell you. I've been with the  
6 Department of Ecology for 15 years.

7 Q Okay. So as far as you know, in that 15 years, this  
8 would be the only wetland-filling penalty that would  
9 have gone to the Pollution Control Hearings Board? X

10 A That's correct.

11 Q And when you're enforcing like a spill, you know what  
12 definitely happened. I mean, you see oil in the water;  
13 is that correct?

14 A Well, I'm not in the oil-spill program.

15 Q Okay. But I guess I'm concerned about just  
16 understanding how Pacific Topsoils got a penalty as  
17 opposed to a warning or as opposed to an order saying,  
18 "Go and get a wetland delineation," or "Go get us a  
19 wetlands study." How did Ecology just leapfrog forward  
20 and give them this penalty?

21 MS. MARCHIORO: Objection: asked and answered  
22 numerous times earlier in the deposition, and I would  
23 not want Mr. Stockdale to be asked to go back over what  
24 I would say was half an hour to 45 minutes of his prior  
25 testimony.

17. Dr. Kelley's testimony about GeoEngineering wetland studies on adjacent Cedar Grove site performed during early growing season.

1 using the seasonal wetland methodology?

2 A Well, I think it requires great care using the  
3 seasonal wetland methodology. I think it is a site  
4 where it needs to be evaluated very specifically at  
5 the early part of the growing season, and if you are  
6 to use the standard wetland hydrology definition that  
7 is typically accepted, the wetland would need to have  
8 or an area would need to have water present for 14  
9 consecutive days during the early part of the growing  
10 season.

11 And the most early part of the growing season  
12 would be the first two weeks in March. And I haven't  
13 been on the site yet the first two weeks in March, and  
14 I feel that absent that kind of information, it's  
15 speculative to delineate wetlands.

16 Q Paul Anderson testified on the growing season. Does  
17 your report address growing season issues?

18 A Yes, it does. I discuss growing season in my report.  
19 I think I testified to that briefly earlier. My  
20 finding is that, looking at the Everett climate data,  
21 there's a definite growing season in the city of  
22 Everett based on probabilities of frost, which is the  
23 Corps methodology. It's been accepted on other sites.  
24 It's the method of evaluating wetlands and growing  
25 season that's being used on the site north, and it's

1 the very common approach to use when you're on a  
2 difficult site and growing season may be an issue.

3 Q And do you want to take a look at the wetland  
4 delineation manual and just identify what sections of  
5 it address growing season issues. Maybe you can look  
6 around, I guess we're on A-40, pages 28 through 29, is  
7 what we're looking at. Excuse me, A-38, page 28 to  
8 29.

9 A And as I said before, these Ecology manuals have  
10 different pages, and on this the growing season is  
11 referred to on page 27, and then it's also referred to  
12 on page 28 and 29.

13 Q And if you'll take a look at A-123, Appendix G, what  
14 does that show?

15 A I guess I haven't found Appendix G yet.

16 JUDGE NOBLE: There appears to be in Exhibit  
17 A-123 only Appendix E.

18 Q Let's do this another way, then, since that's not in  
19 the exhibit.

20 Have you taken a look at the Cedar Grove wetland  
21 delineation study?

22 A Yes, I have.

23 Q And what relevance, if any, did it have about your  
24 conclusions about the necessity of studying this site  
25 during the early growing season?

1 A Well, these Cedar Grove studies essentially used the  
2 same methodology that I used. I don't think they used  
3 the word "problem area methodology," but essentially  
4 that's what they used. They studied the site during  
5 the early growing season. They documented the  
6 presence of wetland hydrology using piezometers and  
7 direct observations and soil pits, and delineated  
8 wetlands on that basis.

9 In some cases they interpreted the wetland  
10 hydrology criteria to be 28 consecutive days of soil  
11 saturation or inundation, and in my opinion that's a  
12 little bit liberal, and that doesn't seem to align  
13 with agency requirements. But I've stated the  
14 criteria I would apply, I will apply, is 14  
15 consecutive days.

16 Q And, Dr. Kelley, just looking at A-102, page 5,  
17 section 2-5, can you just tell us what relevance, if  
18 any, that has to the methodology that you used.

19 A Page 5?

20 Q Page 5, and this is page 5 of the Smith Island  
21 delineation for Cedar Grove Composting.

22 A Yeah, this is where they state their methodology for  
23 groundwater and refer to the approach of using growing  
24 season in making that evaluation.

25 And in this case they identified the last spring

1 frost of 2006 as the start of their growing season,  
2 and so that's a little more liberal than the standard  
3 that I feel that I would apply on this site. I would  
4 use March 1st.

5 Q Still same basic season of the year?

6 A Yes. And the wetland delineation manual says that you  
7 do have to use professional judgment in evaluating  
8 growing season issues.

9 Q And if you go out in the winter, can you even see all  
10 of the species of plants on a site?

11 A Well, I've been out on this site in December, and it's  
12 been brown. I've not observed any growing plants.  
13 I've observed frozen soil on the site in December,  
14 small patches of snow on the site in December.

15 And I've been out on the site in late January,  
16 January 24th, I believe, and some of the soil pits  
17 that I had dug previously had standing water in them,  
18 and that water was in a frozen condition. The top two  
19 inches of the soil were frozen, and based on those  
20 observations and the lack of any green vegetation, I  
21 would conclude that this would not be the growing  
22 season on that site.

23 Q Could you take a look at your report, Exhibit A-1, on  
24 table 7, page 34.

25 A Page 37?

18.Excerpt from GeoEngineering's Cedar Grove wetland  
delineation showing that it was done early in the growing  
season.

The purpose of SAM is to assist wetland professionals in identifying and quantifying a potential wetland function in an individual wetland. The term "potential" is important, because it is usually not possible to verify the presence of a function from a single site visit. A determination of the potential for a function to occur, based on the presence of physical characteristics that are conducive to that function, is all that can be determined in a quick evaluation. For example, we can tell that a site has good amphibian habitat, but it is not always possible, at every season, to tell whether amphibians are using that habitat. SAM is based on a system developed by Reppert (Reppert et al 1979) that has been modified for greater applicability to Northwest wetland ecosystems.

## 2.5 GROUNDWATER MONITORING

GeoEngineers installed 15 shallow groundwater monitoring wells on the site (Figure 5) to measure groundwater elevations during the 2006 growing seasons. Subsurface soil conditions were observed and documented at the time of well installation. Well locations were selected after the routine wetland delineation was performed with the intent of verifying wetland boundaries. Data loggers in each well were used to record the elevation of free water in the well casing relative to the ground surface. The data was downloaded and verified for accuracy in the field weekly. With this data, it is possible to accurately determine the depth of groundwater and duration of soil saturation at each well location.

Both the *Washington State Wetlands Identification and Delineation Manual* (Ecology 1997) and the 1987 *Corps of Engineers Wetland Delineation Manual* define wetland hydrology criteria as areas in which soil conditions are seasonally inundated and/or saturated for a consecutive number of days greater than or equal to 12.5 percent of the growing season. When this level of saturation occurs within 12 inches of the surface, it promotes the establishment of hydrophytic vegetation and the formation of hydric soils. For much of Western Washington at low elevations, the mesic growing season (March 1 to October 31), or frost-free days, has been considered a good rule (Ecology, 1997). For Smith Island, we use this time frame as the growing season, with a total duration of 245 days. The last spring frost of 2006 (Everett-Paine Field Temperature Data) occurred on March 19; continuous groundwater monitoring began on March 20. So for this study, we consider the growing season to start on March 20, with duration of 225 days.

Mapping the presence of wetland hydrology was used to either confirm or invalidate areas that were determined to be wetlands using the routine delineation methodology. Due to historic land use on the site, the routine delineation methodology proved inadequate to make final delineation boundaries for wetlands on this site. This portion of Smith Island has been subject to a high degree of disturbance and modification over time such that traditional wetland indicators (soils, vegetation, hydrology) are no longer a reliable means of identifying wetlands and delineating their boundaries.

## 3.0 RESULTS

### 3.1 PAPER INVENTORY

The USGS topographic map and USFWS NWI maps are tools used to assist with the overall site investigation. The NWI map for this site indicates the presence of wetlands within the project area (Figure 2). NWI maps, produced from interpretation of aerial photographs and topographic maps, are limited to the time frame in which they are produced. The Union Slough channel adjacent to the northern boundary of the site is classified as riverine, tidal, unconsolidated bottom, permanently flooded (R1UBv) deep water habitat. The inter-tidal wetlands associated with the slough are identified as tidal riverine aquatic bed, unconsolidated, regularly exposed bed wetlands (R1AB/USN). Four areas of palustrine, emergent, temporarily flooded (PEMA) are mapped within the project area, as well as one seasonally inundated, palustrine emergent/scrub-shrub area (PEM/SSC).



Figure 3 is the current soil survey digital coverage from the NRCS. Soil data excerpted from the *Soil Survey of Snohomish County Area, Washington* (USDA 1983) identifies one soil unit mapped within the project area as Puget silty clay loam (Map Unit 55), a mesic Typic Fluvaquent. This soil is listed as hydric in the *Hydric Soils of the State of Washington* (USDA 1991). According to the soil survey, this soil is described as a very deep, artificially drained soil formed in alluvium found on depressional areas in flood plains from sea level to 650 feet. Slopes are generally inclined at gradients ranging from 0 to 2 percent. The top layer is dark grayish brown silty clay loam about 9 inches thick. Beneath the surface layer is an olive gray or gray silty clay loam about 60 inches thick or more. A seasonal water table is at a depth of 24 to 48 inches. Permeability is low and available water capacity is high with 60 inches or more of effective rooting depth.

Other soil units mapped adjacent to the project area are classified as urban land (Map Unit 78) and Xerorthents, level (Map Unit 82). Urban land units are areas that have been developed and covered by streets, buildings, parking lots and other structures that obscure or alter the soils. Xerorthents, are found on till plains ranging from 5 to 1,000 feet in elevation. These units consists of nearly level areas where the surface layer, subsoil and substratum have been greatly disturbed, removed or replaced by other soil material. These areas include unpaved parking lots, dikes and levees, mobile home parks, athletic fields and other urban uses. Also included are areas of debris such as wood chips from lumber mills (USDA 1983).

### 3.2 AERIAL PHOTOGRAPH ANALYSIS

Aerial photographs obtained from DNR include photos taken in 2001, 1996, 1991, 1987, 1983, 1978, 1969 and 1965. These photos have been digitally reproduced and are presented in Appendix A. Oblique aerial photos were produced from over flights in 2006 and are used as background for the report figures. Since 1965 the site has been primarily used for agriculture with the site actively cultivated as recently as spring 2005. Based on historic records, the abandoned railroad grade was constructed in 1895 and was in use until 1901. A structure was located within the center portion of the project area. The longitudinal drainage ditch located in the northeastern portion of the project area was present in 1965 (Appendix A; Figure A-1)

The 1969 photograph (Appendix A; Figure A-2) shows the majority of the study area to be cleared and graded with a developing tree and shrub layer within in the abandoned railroad grade. Additional shrubs are trees can be seen in the southern portion of the study area. The study area is dominated by grasses and has a network of ambulating trails, most likely, trodden by livestock. The site appears to be drier than other areas of Smith Island that do not show evidence of agricultural use in 1969.

By 1978 (Appendix A; Figure A-3), the east-west access road had been installed to service a log yard facility at the present Cedar Grove Composting facility site. Shrub and trees species had been removed from the majority of the study area with the exception of a few scattered clumps. However, emergent vegetation structure and diversity appears to be increasing. Subsequent photos from 1983 and 1987 (Appendix A; Figure A-4, Figure A-5) display a vegetation pattern indicative of non-forested, palustrine wetlands. Agricultural use of the site is apparent in the 1978 photograph. Evidence of small clearings are present in the 1978 photo, which persist up to the 1987 photo. These may be livestock wallows.

By 1991, a localized area of filling had recently been completed in the east portion of the project area (Appendix A, Figure A-6). The southern portion of the site showed a greater diversity in vegetation, with shrub vegetation becoming established on a portion of the site.

Up until 2001, there appears to be little change in land use of the site. The 2001 photo (Appendix A; Figure A-8) shows clear distinctions in land use with little change in the western half of the site relative to previous photos. The area immediately west of the longitudinal ditch appears to have been drained and/or cleared due to the prevalent vegetation shift. The area east of the longitudinal ditch has a vegetation pattern associated with wetland conditions with a series of wide linear paths possibly created by farm machinery. The photo also shows the southern portion of the project area with an irregular network of trails for apparent cattle grazing or localized agricultural uses.

### 3.3 FIELD DELINEATION

The site was investigated by a thorough field review of the entire study area during three separate field visits. The northwestern and southeastern portions of the site were delineated between May 12 and May 25, 2005, the southwestern portion of the site was delineated on April 23, 2007 and the northeastern portion of the site was delineated on April 24, 2007. Data was collected at numerous locations within the study area to identify the presence of wetland indicators. Figure 4 presents sample plot locations. Topographic positioning, presence of hydrophytic vegetation and evidence of near surface soil saturation and/or standing water indicated potential wetland areas. Further investigation confirmed or denied the presence of all three wetland parameters within the project site. Photographs taken during the wetland delineations are included in Appendix C of this report.

### 3.4 GROUNDWATER MONITORING

Groundwater data was collected at 15 shallow monitoring wells located in transects throughout the project area. Data was collected eight times daily beginning on March 20, the first frost-free day of the growing season recorded at the Paine Field weather station. Figure 5 presents locations for the monitoring wells overlain atop the original wetland boundaries as determined by the routine delineation method.

Figure E-1 (Appendix E) presents depth to groundwater for all wells from March 20 through May 20. This period was selected for presentation because groundwater depths site-wide trend well deeper than 12-inches after early May, as the site dries up during the summer months. It is assumed that the period of highest groundwater depths, and therefore the critical period for defining wetland hydrology, is from March 20 through May 1.

A review of groundwater data indicates that shallow groundwater depth on the Smith island site fluctuates primarily in response to rainfall. Peaks in groundwater elevation (Figure E-1) coincide with precipitation events (Figure E-2). Soil conditions in the well borings are topsoil atop a less permeable, silty clay loam layer. Shallow groundwater appears to be perched atop this less permeable silty clay loam layer throughout the site. Inundation depths and wetland presence are largely determined by the heterogeneity of depth to this soil layer throughout the site. Data was compared to tidal data as well (Figure E-3) to determine whether tidal fluctuations affect shallow groundwater depth. Small, diurnal elevation changes are detected, but on a much smaller scale than the tides. We conclude that rainfall atop a less permeable layer is the primary determinant for shallow groundwater elevation throughout the site, with tidal influence being negligible.

According to the defined growing season for this site (225 days), a well must demonstrate inundation to within 12 inches of the surface for a consecutive number of days equal or exceeding 12.5 percent (28 days) to meet the wetland hydrology criteria. Of 15 wells, eight meet or exceed these criteria: wells 1, 2, 5, 6, 10, 12, 13, and 15. These wells match wetland areas established by the routine methodology.

Wells that do not meet the wetland hydrology criteria include: wells 3, 4, 7, 8, 9, 11, and 14. Of these sites, wells 3, 4, 7, 8, 11 and 14 are located in areas determined "upland" by the routine methodology.

However, well 9 is located within an area determined to be wetland by the field delineation. Wells 7, 8, 9, and 14 form a contiguous triangle (Figure 6) at the bottom portion of the site. The data demonstrates that these locations do not meet the wetland hydrology criteria. Soils and vegetation at these locations are highly disturbed and thus are no longer clear indicators for wetland presence. Hydrology clearly shows that these locations do not meet the criteria set forth by the Washington State Wetland Delineation Manual, and accordingly should be removed from areas delineated during the routine method wetland delineation as shown on Figure 7.

### 3.5 EXISTING SITE CONDITIONS

The project area is located on Smith Island west of SR 529 and the BNSF right-of-way. This portion of Smith Island is bisected by the Cedar Grove Composting Facility access road. Smith Island is bound on the north and east by Union Slough and to the south and west by the Snohomish River. Past land use practices on Smith Island include diking and draining areas for cropland and pasture and logging yard operations and storage. The project site is generally level and dominated by grasses.

#### 3.5.1 Site Vegetation Characteristics

The site had been disked prior to the time of the wetland surveys. Grass species are by far the dominant vegetation types on the site. Characteristic species include reed canary grass (*Phalaris arundinacea*), redtop (*Agrostis alba*), colonial bentgrass (*A. capillaries*) and northern mannagrass (*Glyceria borealis*). Other plant species commonly observed on the site included bull thistle (*Cirsium vulgare*) and creeping buttercup (*Ranunculus repens*).

#### 3.5.2 Site Wildlife Observations

Wildlife observed during the delineations consisted mainly of passerine bird species. Osprey (*Pandion haliaetus*) were observed utilizing on-site trees as defensive positions against bald eagle (*Haliaeetus leucocephalus*) nest predation. Several great blue herons (*Ardea herodias*) were also observed flying over the area.

#### 3.5.3 Surface Hydrology

The site contains agricultural drainage ditches that convey surface water within the site towards the tidegates in the northern and western portions of the dike. The tide gate is designed to prohibit any flow of tidal waters into the site. Ditches are oriented adjacent and parallel to the dikes and access road.

#### 3.5.4 Slough And Other Historical Water Features

The NWI map identified the east-west blind slough along the southern border of the site as a perennial drainage. This slough is classified by the City of Everett as a Type S stream (EMC SMP 19.37.160). The slough is isolated from tidal inflow by a tide gate. The tide gate completely eliminates any tidal hydrology to the channel. One additional slough located in the northeastern portion of the project area is identified on the 1973 USGS topographic 7.5-minute map for the Marysville quadrangle and was observed during the investigation. This feature conveys water north from the northeastern portion of the study area, through a tide gate and into Union Slough. These sloughs primarily function to discharge ground water fluctuating with the seasonal water table. Overland runoff from surrounding land also provides some hydrology. Ground water appears to be relatively unmodified within the project area. However, evidence of past dredging to clear and maintain the channel is present.

19. Testimony of Dr. Kelley regarding the importance of  
carefully studying hydrology on site that has been diked.

---

1 the team that was out on the site?

2 A Yes, he was out on the site for most of that morning  
3 and some of the afternoon, is my recollection.

4 Q And he's a geologist; is that correct?

5 A That's my understanding.

6 Q Can you explain your approach to the evaluation of  
7 wetlands adjacent to the fill.

8 A Well, I commented earlier that we used the problem  
9 area methodology, and I commented about all the holes  
10 that we dug next to the fill. We were at the site in  
11 early April, and so as quickly as possible I wanted to  
12 get some record of what the hydrologic conditions were  
13 next to the fill, because early April is considered in  
14 the growing season, and by most accounts it's one  
15 month into the growing season, and so I didn't want to  
16 be in a situation of not having any record in the soil  
17 of the natural soil next to the fill.

18 And the problem area methodology requires that  
19 you obtain good documentation of whether wetland  
20 hydrology is actually present in a wetland, so you're  
21 using an indicator that is a more reliable indicator  
22 than, for example, oxidized rhizospheres, which are  
23 often a good indicator that there may be wetland  
24 hydrology, but it's not bulletproof.

25 Q And it's just that; it's an indicator, isn't it?

1 A Well, it is an indicator.

2 Q We've had a lot of discussion this morning about when  
3 you delineate a wetland. Tell us, when do you  
4 delineate a wetland?

5 A Well, the requirement, and there's been questions  
6 about this this morning, the requirement is that the  
7 wetland evaluation -- well, the requirement is that to  
8 be a wetland, it has to have wetland hydrology during  
9 the growing season. That's part of the definition of  
10 wetland hydrology, is that it's present during the  
11 growing season. In Western Washington, as identified  
12 in the Ecology manual, the growing season is generally  
13 defined between March 1st and October 30th.

14 The Ecology manual -- actually, I think it's in  
15 appendices to the Ecology manual -- states that in  
16 some coastal areas, the growing season can occur all  
17 year long. I've worked in coastal areas where we have  
18 considered the growing season all year long, out on  
19 the Olympic Peninsula, out on the outer coast and in  
20 peninsular areas of Puget Sound that are highly  
21 influenced by warmer waters next to them.

22 The climatological data for Everett shows that  
23 there's a clear growing season. They identify the  
24 first date and last date of probabilities of frost,  
25 and this is the methodology that the Corps manual uses

1 to identify a growing season. It's also stated in the  
2 Ecology manual as the appropriate approach to identify  
3 the growing season.

4 And that was the methodology I used here. It's  
5 the methodology that I've used on many other wetland  
6 projects where wetland delineations have been accepted  
7 by the Corps. It's the methodology that has been used  
8 on sites north of this project area by GeoEngineers  
9 consultants, I believe, on behalf of Cedar Grove.

10 Q What effect, if any, did you give to -- were you aware  
11 of characteristics of the site such as tide gates and  
12 dikes and so on?

13 A Yes, I was. I knew from previous work in the area  
14 that Smith Island was diked, and I drove around and  
15 examined those dikes. I found a tide gate at the  
16 northeast corner of the site. The tide gate is quite  
17 low in elevation. It's probably six to eight feet  
18 below the ground surface of the site, and it has a  
19 very strong influence on the drainage characteristics  
20 of the site because it prevents Snohomish River water  
21 and estuarine water from Puget Sound moving into the  
22 site. And the dikes, of course, prevent flooding.

23 Q So what conclusions, based on the presence of tide  
24 gates and dikes and drainage tiles and so on, did you  
25 make about the hydrologic regime of the site?

1 MS. MARCHIORO: Objection. There's no  
2 testimony by Dr. Kelley about observations of drain  
3 tiles, so there's an additional fact that was entered  
4 into that question.

5 MS. KOLER: I withdraw the drain tile and  
6 will go with dikes and tide gate.

7 JUDGE NOBLE: Okay.

8 A I have not observed drain tiles on the site. I've  
9 observed some small drainage ditches on the site. The  
10 dikes and tide gates suggest to me a highly altered  
11 site.

12 And I examined the soil survey that's available  
13 on the Internet, and these are exhibits in the record  
14 that show the Puget soil type is a hydric soil, but  
15 it's mapped as a drained hydric soil, and the Natural  
16 Resources Conservation Service Web site, which  
17 documents and maps and makes available to the public  
18 wetland soil information and identifies, I think, that  
19 as much as 85 percent of Puget soil is a drainage  
20 soil.

21 So that was another indicator to me that this is  
22 a hydrologically modified site and that when the Soil  
23 Conservation Service did its soil mapping, they mapped  
24 the site with that understanding.

25 Q Did the vegetation on the site manifest any sign of



1       being on a hydrologically altered site?

2   A    No, I can't say that the vegetation indicated that.

3       The vegetation, as I've stated before, was facultative

4       wetland. It's difficult to interpret because

5       facultative wetland plants can occur both in wetland

6       areas and in nonwetland areas. And when you have

7       facultative plants on a hydrologically altered site,

8       then it's especially difficult to rely on vegetation

9       to make a wetland determination.

10   Q   ~~And, in fact, on sites that are hydrologically~~

11       altered, can they not possess the presence of

12       hydrophytic vegetation and hydric soils for many

13       decades following the alteration of hydrology?

14   A    They can. I don't know about many decades, but they

15       can persist, especially hydric soils can persist for

16       many decades. Whether hydrophytic vegetation persists

17       or not depends on the nature of that vegetation. A

18       forest vegetation might persist for many decades.

19   Q    Are you familiar with WAC 173-22-080 that states:

20       (READING) The presence of hydrophytic vegetation

21       and hydric soils may persist for decades following the

22       alteration of hydrology.

23   A    I'm familiar with that WAC. I didn't recall that

24       specific quote.

25   Q    Okay. What observations did you make about hydrology

1 on the site based on using the problem area  
2 methodology?

3 A Well, I found that along the south perimeter of the  
4 site of the fill footprint, there's areas where there  
5 is wet soil. I found wet soil during my observations  
6 in April 2007, and I found wet soil in that area  
7 during ~~December 2007 and January 2008.~~

8 I found that along most of the remaining  
9 perimeter of the site, the west side of the site and  
10 the north side of the site, that wetland hydrology was  
11 generally absent, that occasionally there would be a  
12 high water table that might persist for a week or so  
13 during the winter months, but my observations show  
14 that that's ephemeral, that it doesn't persist all  
15 winter long.

16 And we've talked before about the green dot. I  
17 guess that's the name of it. And I did find the green  
18 dot has wetland hydrology, and I identified that as a  
19 real wetland, a bona fide wetland.

20 Q And the green dot was unfilled, was it not?

21 A That's correct.

22 Q Do you want to take a look at R-11 at pages 81 to 82.

23 A (Witness complies.)

24 JUDGE NOBLE: And we have that as Exhibit

25 A-38.

1 A Yes.

2 Q What influence, if any, did that document have on your  
3 evaluation of the site?

4 A Well, I reviewed this document because it does provide  
5 additional guidance and background on how you might  
6 evaluate wetlands and delineate wetlands, and there's  
7 a section in this document that addresses wetland  
8 evaluations on sites where you have drainage  
9 alterations and partially drained soil, and I found  
10 that relevant to the Smith Island site.

11 Q Are seasonal wetlands common in Snohomish County?

12 A Yes, they're very common. They're common in  
13 agricultural areas in Snohomish County, and they're  
14 common really in all landscape positions, in woodlands  
15 and disturbed areas and undisturbed areas.

16 Q Are seasonal wetlands difficult to identify and  
17 delineate?

18 A They're quite variable in how they are to delineate.  
19 In a natural woodland where the natural vegetation has  
20 not been disturbed and the soils have not been  
21 disturbed, they can be quite readily delineated, and  
22 you can often delineate them any time of year, whether  
23 there's hydrology present or not.

24 But when you're on a site that has been  
25 hydrologically altered and where the soils are

1       classified as being partially drained and where the  
2       vegetation has been modified so that most of the  
3       plants on site are not plants that are native to  
4       Western Washington, there's quite a bit of uncertainty  
5       in delineating seasonal wetlands.

6   Q   Have you had experience on other sites in the area  
7       with seasonal wetlands?

8   A   Yes, I have.

9   Q   Could you tell us about that.

10  A   I've delineated seasonal wetlands really throughout  
11       King and Snohomish County.  Many of the wetlands that  
12       I delineated for the SeaTac Airport expansion were  
13       seasonal wetlands.  I delineated seasonal wetlands  
14       last spring at the same time these studies were going  
15       on near Snohomish and near Monroe.

16  Q   Do you want to take a look at Appellant's Exhibit R-35  
17       and tell me what that is.

18  A   R-35?

19  Q   I'm sorry, it's A-35.

20  A   Well, this is an excerpt of some work that I completed  
21       at the airport where the Port was required to prepare  
22       some hydrologic monitoring in wetlands that were near  
23       or thought to be near some of the third runway  
24       expansion areas, and a requirement of the permit the  
25       Port received was to monitor wetlands over time to see

1 like to make an offer of proof that since we're  
2 talking about seasonal wetlands, that that is very  
3 relevant and that this experience that the Port of  
4 Seattle had, you know, indicated in that report is  
5 relevant.

6 JUDGE NOBLE: It's not a complete report.  
7 It just has data from the other site, and I've ruled  
8 that it's not relevant.

9 Thank you.

10 MS. KOLER: Okay. Thank you.

11 Q (Continuing by Ms. Koler) And then A-31, can you take  
12 a look at A-31 and tell us what effect, if any, that  
13 had on your evaluation of the Smith Island site.

14 A Well, A-31 includes climate data from areas near the  
15 Smith Island site, and it's common, at least in my  
16 approach, when I evaluate wetlands that have seasonal  
17 hydrology, to examine climate data and to determine  
18 how rainy it has been and whether maybe the absence of  
19 hydrology at a site might be because it's been  
20 particularly dry or the presence of hydrology at a  
21 site might be because it's been a very wet period of  
22 time.

23 So this is some of the climate data that I used  
24 in making that evaluation.

25 Q And was this site difficult to evaluate for wetlands

1 using the seasonal wetland methodology?

2 A Well, I think it requires great care using the  
3 seasonal wetland methodology. I think it is a site  
4 where it needs to be evaluated very specifically at  
5 the early part of the growing season, and if you are  
6 to use the standard wetland hydrology definition that  
7 is typically accepted, the wetland would need to have  
8 or an area would need to have water present for 14  
9 consecutive days during the early part of the growing  
10 season.

11 And the most early part of the growing season  
12 would be the first two weeks in March. And I haven't  
13 been on the site yet the first two weeks in March, and  
14 I feel that absent that kind of information, it's  
15 speculative to delineate wetlands.

16 Q Paul Anderson testified on the growing season. Does  
17 your report address growing season issues?

18 A Yes, it does. I discuss growing season in my report.  
19 I think I testified to that briefly earlier. My  
20 finding is that, looking at the Everett climate data,  
21 there's a definite growing season in the city of  
22 Everett based on probabilities of frost, which is the  
23 Corps methodology. It's been accepted on other sites.  
24 It's the method of evaluating wetlands and growing  
25 season that's being used on the site north, and it's

1 the very common approach to use when you're on a  
2 difficult site and growing season may be an issue.

3 Q And do you want to take a look at the wetland  
4 delineation manual and just identify what sections of  
5 it address growing season issues. Maybe you can look  
6 around, I guess we're on A-40, pages 28 through 29, is  
7 what we're looking at. Excuse me, A-38, page 28 to  
8 29.

9 A And as I said before, these Ecology manuals have  
10 different pages, and on this the growing season is  
11 referred to on page 27, and then it's also referred to  
12 on page 28 and 29.

13 Q And if you'll take a look at A-123, Appendix G, what  
14 does that show?

15 A I guess I haven't found Appendix G yet.

16 JUDGE NOBLE: There appears to be in Exhibit  
17 A-123 only Appendix E.

18 Q Let's do this another way, then, since that's not in  
19 the exhibit.

20 Have you taken a look at the Cedar Grove wetland  
21 delineation study?

22 A Yes, I have.

23 Q And what relevance, if any, did it have about your  
24 conclusions about the necessity of studying this site  
25 during the early growing season?

1 A Well, these Cedar Grove studies essentially used the  
2 same methodology that I used. I don't think they used  
3 the word "problem area methodology," but essentially  
4 that's what they used. They studied the site during  
5 the early growing season. They documented the  
6 presence of wetland hydrology using piezometers and  
7 direct observations and soil pits, and delineated  
8 wetlands on that basis.

9 In some cases they interpreted the wetland  
10 hydrology criteria to be 28 consecutive days of soil  
11 saturation or inundation, and in my opinion that's a  
12 little bit liberal, and that doesn't seem to align  
13 with agency requirements. But I've stated the  
14 criteria I would apply, I will apply, is 14  
15 consecutive days.

16 Q And, Dr. Kelley, just looking at A-102, page 5,  
17 section 2-5, can you just tell us what relevance, if  
18 any, that has to the methodology that you used.

19 A Page 5?

20 Q Page 5, and this is page 5 of the Smith Island  
21 delineation for Cedar Grove Composting.

22 A Yeah, this is where they state their methodology for  
23 groundwater and refer to the approach of using growing  
24 season in making that evaluation.

25 And in this case they identified the last spring



1 frost of 2006 as the start of their growing season,  
2 and so that's a little more liberal than the standard  
3 that I feel that I would apply on this site. I would  
4 use March 1st.

5 Q Still same basic season of the year?

6 A Yes. And the wetland delineation manual says that you  
7 do have to use professional judgment in evaluating  
8 growing season issues.

9 Q And if you go out in the winter, can you even see all  
10 of the species of plants on a site?

11 A Well, I've been out on this site in December, and it's  
12 been brown. I've not observed any growing plants.  
13 I've observed frozen soil on the site in December,  
14 small patches of snow on the site in December.

15 And I've been out on the site in late January,  
16 January 24th, I believe, and some of the soil pits  
17 that I had dug previously had standing water in them,  
18 and that water was in a frozen condition. The top two  
19 inches of the soil were frozen, and based on those  
20 observations and the lack of any green vegetation, I  
21 would conclude that this would not be the growing  
22 season on that site.

23 Q Could you take a look at your report, Exhibit A-1, on  
24 table 7, page 34.

25 A Page 37?

1 Q That's correct. No, excuse me, table 7, page 34, of  
2 A-1.  
3 A Okay.  
4 MS. MARCHIORO: I'm sorry. Which page?  
5 MS. KOLER: Page 34.  
6 JUDGE NOBLE: Excuse me. There's no table  
7 on page 34.  
8 MS. KOLER: Do you want me to give you the  
9 table that's on our page 34? It must have been  
10 inadvertently left out. Table 7 on page 34.  
11 THE WITNESS: It's a two-page table.  
12 MR. LYNCH: I have that.  
13 MS. KOLER: Judge Noble, do you want me to  
14 bring mine forward?  
15 JUDGE NOBLE: No, no, I just want to make  
16 sure --  
17 MS. KOLER: So we're at A-1.  
18 JUDGE NOBLE: Okay. Thank you. I've got it  
19 now.  
20 Q (Continuing by Ms. Koler) Can you explain this table  
21 to the Board, Dr. Kelley.  
22 A Yes. These are the sites located adjacent to the  
23 perimeter of the fill that I started monitoring for  
24 wetland hydrology, and I explained earlier that I  
25 started this monitoring on the first day that I was

1 out on the site, and this was April 2nd, when I dug  
2 these holes.

3 And April 3rd, the very next day, I started  
4 taking measurements, and I took measurements  
5 throughout the early part of April, through mid April  
6 during the 2007 growing season, and then as the site  
7 got wet again in the fall, I started making periodic  
8 observations during December and January, and I'm  
9 going to continue that in February and certainly the  
10 early part of March.

11 And then I think we'll have a substantial amount  
12 of information to conclude conclusively where wetland  
13 hydrology exists next to the fill and where it does  
14 not. And with that information you can use the  
15 atypical methodology, as Paul Anderson explained, and  
16 infer that where fill was placed next to a wetland,  
17 the wetland may have been filled, and where fill was  
18 placed in a nonwetland area, a wetland probably was  
19 not filled.

20 Q Do you show where these monitoring wells are anywhere  
21 in your report? I think it's at Appendix A.

22 A Yes. There's a map in Appendix A, there's a number of  
23 maps. There's an oversize map in Appendix A that  
24 indicates where these are. And on this map, there's a  
25 more heavy black line that delineates the perimeter of

1 the fill, and if you examine this, in relatively small  
2 type there's a variety of test bores that have numbers  
3 next to them, integer numbers, number 6, number 7, and  
4 near that number 2 is also a number with two decimals.

5 The number with decimal places is the ground  
6 elevation of that observation, and then the test bore  
7 number corresponds to the data that's listed in  
8 table 7 on page 34. And this table is providing the  
9 depth below the ground surface where I observed  
10 standing water.

11 Q Do you want to just go through that data for the  
12 Board, or do you want the Board to look at it  
13 themselves, or how do you want to handle that?

14 A Well, I can quickly run through my findings. What I  
15 found was --

16 Q Or you can just summarize your findings.

17 A I found on the south edge of the fill that there were  
18 wet soil conditions, and in this data matrix, that  
19 would correspond to soil pit numbers 1 through 5, and  
20 during the winter months, 6 and 7 have some seasonal  
21 wetness, so this is an area where there's wet soil  
22 conditions.

23 I found that along the west side of the perimeter  
24 of the fill and around up to the north side, that the  
25 soils were generally dry, they did not have a water

1 summarize your findings relative to that figure.  
2 A Page 48 of my report?  
3 Q No. You have Exhibit A-48, you have an exhibit at  
4 A-48.  
5 A Okay.  
6 Q And then you have a figure, you have figure 2 in your  
7 report.  
8 MS. DOYLE: I'm sorry, counsel, but you're  
9 losing me. What exhibit number?  
10 MS. KOLER: We're at Exhibit A-1,  
11 Dr. Kelley's report.  
12 JUDGE NOBLE: So it's Exhibit A-1.  
13 Q (Continuing by Ms. Koler) So we're at Exhibit A-1,  
14 and you have exhibit -- you have page 48, you have a  
15 summary of problem area analysis for potential  
16 wetlands, and then you have a figure.  
17 A The figure next to it?  
18 Q Yeah.  
19 A So this basically shows the summary that I just  
20 provided, and figure 12, which is on page 49, shows  
21 the area where I found wet soil adjacent to the fill  
22 that I believe should be considered potential wetland,  
23 and that should require further verification to  
24 ascertain whether it is indeed wetland in the spring  
25 of this year.

1 objection if they're outside of the ones that  
2 Dr. Kelley has described in terms of date.

3 JUDGE NOBLE: I understand the objection. I  
4 think that they could be admitted for whatever weight  
5 they can be given --

6 MS. MARCHIORO: Thank you.

7 JUDGE NOBLE: -- given their condition and  
8 the inability to determine exactly what time of year  
9 most of them were taken.

10 Exhibit A-27 will be admitted.

11 Q (Continuing by Ms. Koler) Dr. Kelley, did you use  
12 oxidized rhizospheres in your wetland assessment?

13 A I did not rely on that indicator to evaluate the site.  
14 I did observe oxidated rhizospheres on the site  
15 similar to what Paul Anderson has stated. I found in  
16 some areas, particularly along the south edge of the  
17 site, that they were fairly prominent, and in many  
18 others areas I do not find any oxidized rhizospheres.

19 But the quality of that indicator to conclusively  
20 identify wetlands is in my opinion questionable  
21 because it is identified in the wetland delineation as  
22 a less reliable indicator.

23 And the wetland delineation manual identifies  
24 that you should have supporting hydrology information  
25 if you're going to rely on that indicator, and it also

1        about wetlands being beneath the fill, and I disagree  
2        with their conclusions on that. ~~And then there's a~~  
3        small wetland area near the central portion of the  
4        fill that I did not find to have wetland hydrology.  
5        Q    That's the V-shaped man-made wetland area?  
6        A    Yes, that's correct.  
7        Q    And you looked at A-102, the Cedar Grove wetland  
8        delineation, and A-123, the Northwest batch plant site  
9        wetland delineation. What impressions do you have, if  
10       any, of those reports?  
11       A    Those struck me as well-done professional wetland  
12       reports that generally followed the wetland  
13       delineation guidance, and they followed an approach  
14       that was similar to the approach that I took in  
15       evaluating wetlands on the site. They examined their  
16       sites during the early growing season, and they  
17       focused on documenting the presence of wetland  
18       hydrology.  
19       Q    And what about the Northwest Wetland Inventory -- I  
20       mean, excuse me, the National Wetlands Inventory?  
21       A    Well, we talked about that or you've talked about that  
22       on other days. My feeling is that the National  
23       Wetland Inventories are useful when you start a  
24       project, but when you start collecting your own data  
25       and are actually on the site digging holes and

1 Q Dr. Kelley, you opine in your report that the  
2 southwest corner of the site was wet but you thought  
3 further study should be done.

4 Why did you think further study should be done?

5 A Well, I first examined that site in April and found  
6 high groundwater. I was on the site April 2nd and 3rd  
7 observing that area, and it followed March 2007 where  
8 there was substantial above normal precipitation. I  
9 think there was 4.6 inches of rain that fell in March  
10 of 2007, and that was above normal precipitation. It  
11 was above normal precipitation using methods that the  
12 Natural Resources Conservation Service identified for  
13 evaluating the reliability of precipitation data in  
14 making wetland determinations.

15 So I was a little hesitant to use my observations  
16 conclusively as to whether there was wetland there or  
17 not. I've observed that area this winter, and there  
18 are times when there's a lot of water there, and a  
19 week-and-a-half or two weeks later, the water table  
20 may have dropped six or eight inches, and so on one  
21 day I may see it at near the surface, two or three  
22 inches below the surface, and on other dates I  
23 observed the water table eight, ten, near 12 inches  
24 below the surface.

25 And my opinion of that kind of water level



1 fluctuation, when it's observed during the nongrowing  
2 season and the rainy season, is that there's a fair  
3 chance or there's some probability that's more than  
4 minuscule that that area might not be a wetland, it  
5 may not meet the wetland criteria, were it observed in  
6 the first growing season, the first two weeks in  
7 March, during normal precipitation.

8 Q Do you have some thoughts that that could be like a  
9 so-called seasonal wetland area like you observed at  
10 Port of Seattle?

11 A Well, if it does meet the wetland criteria, it's  
12 clearly a seasonal wetland. If it doesn't meet the  
13 technical criteria of a wetland, it's not a wetland.

14 I have worked on projects where we have completed  
15 wetland delineations in the fall, early fall, and  
16 confirmed in November and December that there is water  
17 on the site and come back to those sites in future  
18 years to examine and monitor them, and I've found in  
19 other years, when rainfall is more normal, that they  
20 don't have water in the early growing season, they  
21 lose all water during the summer, and in some cases  
22 they do not have water even during the wet winter  
23 months.

24 I've worked on projects where a wetland  
25 determination was made during a very wet November in

1 And these are the same kinds of situations that  
2 have been evaluated and delineated on the property  
3 north of this site, and they're the same kinds of  
4 issues that Parametrix was trying to evaluate when  
5 they did their study.

6 Q Isn't there also -- I mean, it seems like there's  
7 cautions with all three aspects of evaluating a  
8 wetland, whether the soil is hydric or the vegetation,  
9 but aren't there also cautions that come with looking  
10 at the hydrology, because you indicated, I believe,  
11 that there was some team that was looking at some site  
12 somewhere and they're looking at the site shortly  
13 after a large March rainfall. So aren't there also  
14 cautions that come with looking at the hydrology?

15 A That's correct. And so you want to look at the  
16 hydrology during the early part of the growing season,  
17 and you want to look at the hydrology during a period  
18 of normal rainfall in early March. It rains about .13  
19 inches per day at this site in Everett. That would be  
20 the long-term average. So you can use that .13 number  
21 and evaluate a two-week period and say, was this a  
22 two-week period that had normal rainfall, was it above  
23 normal, was it below normal, and you can make  
24 professional judgments on that basis. You could  
25 determine that there was below normal rainfall and

1           So the plants are present all year long. They  
2 cannot always be readily identified all year long.

3 Q I guess my point is, if anything, the plant community  
4 that Mr. Anderson was looking at, the amount of it was  
5 under-represented at the time he was out there because  
6 he was looking in September as opposed to other parts  
7 of the growing season.

8           MS. KOLER: Mr. Lynch, if I could clarify,  
9 he was there October 27th.

10           MR. LYNCH: I'm sorry. Okay, October.

11 A My experience with reed canary grass especially,  
12 because it is kind of a stiff and coarse grass, is  
13 that you can go out now and find dead reed canary  
14 grass on top of the ground, and you can identify that  
15 as reed canary grass and investigate it as a wetland.

16           There's other grasses on this site that cannot be  
17 readily identified outside of the growing season. You  
18 can make dominance estimates during September in most  
19 cases if you can identify the species.

20           I'm not sure I fully understand your question,  
21 but I'm not sure that it relates to the determination  
22 that these wetland plants are indeed occurring on  
23 soils that experience wetland hydrology, and that's  
24 the specific issue that I've been trying to address,  
25 and it's a specific requirement of the manual that you

20. Testimony of Geotechnical expert Sonnegaard regarding the  
effect of fill on soils beneath.

1 JUDGE NOBLE: Any redirect?

2 MS. KOLER: No, there isn't.

3 At this time I would like to thank Mr. Stockdale  
4 for testifying.

5 JUDGE NOBLE: Just a minute. I think the  
6 Board might have a question or two.

7 MS. KOLER: I'm sorry.

8 JUDGE NOBLE: Does the Board have any  
9 questions?

10 All right. You may be excused at this time.  
11 Thank you for your testimony, Mr. Stockdale.

12 MS. KOLER: Thank you, Mr. Stockdale.

13 JUDGE NOBLE: Other witnesses?

14 MS. KOLER: Yes. At this time I'd like to  
15 call Jon Sondergaard.

16

17 JON SONDERGAARD, being first duly sworn to tell the  
18 truth, the whole truth and nothing  
19 but the truth, testified as follows:

20

21 DIRECT EXAMINATION

22 BY MS. KOLER:

23 Q Good afternoon, Mr. Sondergaard.

24 Can you take a look --

25 JUDGE NOBLE: We need to have him identify

1           himself and spell his name.

2                       MS. KOLER:   Okay.

3   Q   (Continuing by Ms. Koler)   Could you identify yourself

4           and spell your name.

5   A   My name is Jon Sondergaard.   First name J-O-N, last

6           name S-O-N-D-E-R-G-A-A-R-D.

7   Q   Can you take a look at your C.V. at Exhibit A-105 and

8           tell me if that correctly represents your educational

9           background and employment.

10   A   Yes.

11   Q   And does that correctly reflect your qualifications as

12           an expert witness?

13   A   I believe so, yes.

14   Q   Have you had occasion to go to Pacific Topsoils'

15           35-acre field?

16   A   Yes, I have.

17   Q   And have you conducted geotechnical testing of soils

18           at that site?

19   A   Yes, we have.

20   Q   What kind of tests did you perform?

21   A   We collected a sample of the native soil at the site

22           at a specific location and returned that sample to our

23           laboratory in our office and performed a consolidation

24           test on that sample.

25   Q   And did the consolidation test that you performed

1       been consolidated and compressed and would not return  
2       to where its original position was.

3   Q   Does placing fill on native soils like this or a  
4       stockpile like this on native soils, does that prevent  
5       the recharge of the shallow water table?

6   A   No, it does not prevent that.

7   Q   Explain to me what effect, if any, it has on it.

8   A   Well, in this particular case I looked at -- another  
9       thing that we did and was asked to do was to take a  
10      look at the size of this fill in relation to what we  
11      interpreted to be the recharge area of the shallow  
12      water table beneath Smith Island. And in looking at  
13      that, which is depicted on this handout that Ms. Koler  
14      just gave you --

15               JUDGE NOBLE: Wait. Is this another  
16      exhibit?

17               MS. KOLER: No. It's for illustrative  
18      purposes only.

19               JUDGE NOBLE: All right. Let's give it a  
20      number, even though it's for illustrative purposes, so  
21      that you can refer to it in the record and it will be  
22      clear.

23               So it will be Exhibit A-143 for illustrative  
24      purposes only.

25   Q   (Continuing by Ms. Koler) So explain to us what

1 effect the -- oh, I already asked the question, okay.  
2 A Basically what this figure shows is the area outlined  
3 in red, which is essentially Smith Island, is the area  
4 I interpreted to be the recharge area for this shallow  
5 water table that you see throughout Smith Island.

6 The blue hatched area is an approximation of  
7 where I determined the location of the fill pile in  
8 question to be.

9 And when I, you know, compared the footprint of  
10 that fill to the area of the recharge, that fill pile  
11 covers approximately two-and-a-half percent of the  
12 total recharge area for the shallow water table. So  
13 when the shallow water table there would be recharged  
14 primarily by rainfall that falls onto the ground at  
15 Smith Island, the fill pile there will intercept  
16 approximately, you know, two percent or two-and-a-half  
17 percent of that total rainfall that falls on the  
18 recharge area, and the water that falls on the fill  
19 would either infiltrate into the fill or run off the  
20 fill and likely become available for recharge at a  
21 later date.

22 But my opinion is that the placement of those  
23 fill piles would not have a significant impact on the  
24 ability to recharge the shallow water table beneath  
25 that fill.



1 Q Can you give us a common sense example of that so we  
2 can picture this in our minds.

3 A (No response.)

4 Q Is it something like if you think of rain being a  
5 shower, give us --

6 A Well, I guess what I've likened it to maybe in the  
7 past is if you picture the shallow water table in a  
8 bathtub, say you have water in a bathtub, where the  
9 level of the water in the tub would be the shallow  
10 water table, say you throw a block of wood on that and  
11 turn the shower on, a certain amount of water that  
12 falls on the block of wood would not fall into the  
13 tub, but the water would still rise in the tub as the  
14 water is entering the tub and it would not have an  
15 impact on -- there would still be water underneath  
16 that piece of wood because the water rises uniformly,  
17 it doesn't leave cavities or anything beneath that  
18 piece of wood, so it flows in to create an equal  
19 surface.

20 So I think it's somewhat similar here where water  
21 that falls onto the ground, even though the area under  
22 that fill is not directly receiving, is being  
23 intercepted by that fill pile and is not infiltrating  
24 into that native ground directly, the water table  
25 underneath the fill is still connected to all that

1     water table around it, so the water that falls outside  
2     of the fill pile will move in to recharge the area  
3     under the fill.

4     Q   And so you're telling me that -- first of all, are you  
5     regarding a block of wood as being a pervious or an  
6     impervious surface or material, just to clarify your  
7     example?

8     A   Probably an impervious surface in that case.

9     Q   Pervious surface or impervious?

10    A   Well, wood is pervious, but --

11    Q   Okay. And then you talked about the water level would  
12    equal out, you wouldn't, like, have a depression in  
13    the water level. Is that like -- what principle is  
14    that?

15    A   Well, if you have changes in head in water, it will  
16    move from high head to low head. So in this instance,  
17    if you're looking at rainfall, rainfall that falls  
18    outside of the pile will infiltrate to the shallow  
19    water quicker than water that falls on the pile,  
20    because that is a shorter path to go.

21           So if the quicker recharge outside the area of  
22    the pile would tend to raise the head of the water  
23    table that's not shadowed by that pile, any increase  
24    in head there above what the water table is below the  
25    pile would cause that water to move underneath the

1 pile because it would move to the area of lower head.

2 Q So does gravity do that?

3 A Yeah, it's gravity, yes.

4 Q If you put fill, a stockpile, on top of native soils,  
5 what effect would that have on pore spaces in the  
6 soils?

7 A Are you referring to the effect of loading soil with  
8 fill?

9 Q Yeah.

10 A Well, the process of consolidation of soil is a result  
11 of as the soil is compressed, air and water is  
12 squeezed out of the soil as the pore space is reduced  
13 due to that compression.

14 Q What effect, if any, would the compression have on the  
15 ability of soils to become saturated?

16 A Well, under the loads we're talking about, and, you  
17 know, we can actually calculate this as a part of our  
18 testing, is that even though the void space porosity  
19 of the soil is reduced, it still maintains a  
20 significant enough amount of porosity to hold water.  
21 And so as long as that porosity is filled 100 percent,  
22 then it would be saturated.

23 So even after consolidation, there's plenty of  
24 porosity and pore space to contain water within that  
25 soil.

1 Q Thank you, Mr. Sondergaard.

2 MS. KOLER: I have no further questions.

3 JUDGE NOBLE: Cross examination?

4 MS. MARCHIORO: Yes.

5

6 CROSS EXAMINATION

7 BY MS. MARCHIORO:

8 Q Now, Mr. Sondergaard, Pacific Topsoils' Smith Island  
9 site is in hydrologic continuity with the Snohomish  
10 River, isn't it?

11 MS. KOLER: Objection. Outside of the scope  
12 of direct.

13 MS. MARCHIORO: Well, you talked about the  
14 recharge, and to the extent that the recharge comes  
15 from all around, that would include the Snohomish  
16 River.

17 JUDGE NOBLE: I think it's appropriate cross  
18 examination within the scope.

19 MS. KOLER: And there's no foundation.

20 A Well --

21 JUDGE NOBLE: There's another objection that  
22 there wasn't a foundation, so perhaps you could lay  
23 some foundation.

24 MS. MARCHIORO: Okay.

25 Q (Continuing by Ms. Marchioro) If I recall correctly,

21. Testimony of Thomas Finnerty regarding agricultural uses of  
PTI site and that fill to be used to cap adjacent Model Toxics  
Control Act remediation site.

DIRECT EXAMINATION

BY MS. KOLER:

Q Mr. Finnerty, where are you -- oh, Mr. Finnerty, what is your name and please spell it for the record.

A Thomas Finnerty, F-I-N-N-E-R-T-Y.

Q Mr. Finnerty, where are you employed?

A Pacific Topsoils.

Q And what is your position?

A I'm the construction manager.

Q Mr. Finnerty, are you familiar with Pacific Topsoils' 35-acre property at Smith Island?

A Yes.

Q Did you have anything to do with the placement of fill on that property?

A Well, yeah. I supervise the division of the company that would be responsible for managing that type of incoming material.

Q Did you look at the area where the fill was placed?

A Prior to placing it? Yes, I did.

Q That's correct.

A Yes.

Q And what observations, if any, did you make about -- first of all, what sort of analysis did Pacific Topsoils go through, if any, before dumping the stockpile on the property?

1 A I don't know anything that was done that you could  
2 actually call an analysis.

3 Q Did you --

4 A I don't understand the question.

5 Q Did you look at the characteristics of the site before  
6 you put down the fill?

7 A Yes.

8 Q And what observations did you make about the area  
9 where you placed the fill as opposed to the area where  
10 you did not place the fill?

11 A Well, the 35-acre site in general, I guess, you know,  
12 has been described many times today, and it is correct  
13 in the statement that it's an agricultural field.

14 MS. MARCHIORO: Objection. Lack of  
15 foundation that he has history with the site other  
16 than observing it at the time the filling was being  
17 done.

18 JUDGE NOBLE: Could you lay some foundation  
19 about his basis for these observations.

20 Q Mr. Finnerty, what knowledge did you have of the  
21 Pacific Topsoils 35-acre field with respect to  
22 agricultural use?

23 A Well, we've owned the adjacent property for a number  
24 of years, and I was also responsible for doing the  
25 reclamation of, I think it's about a 13-acre site that

1 would be directly south of this 35-acre field. And it  
2 was also identified as a wood waste landfill, I  
3 believe, that Weyerhaeuser had had.

4 I was responsible for the reclamation of that,  
5 which took three years probably. During that time  
6 period I could visually see the field to the north  
7 that's in question.

8 Q And what time period were you working on the wood  
9 waste landfill reclamation?

10 A Probably 2002 to 2005, something like that.

11 Q And what observations, if any, did you make about the  
12 field, the 35-acre field, where fill was eventually  
13 placed?

14 A Only that it had been mowed and on a couple of  
15 occasions I remember there being cattle there.

16 Q And what observations, I guess, if we could go back  
17 now --

18 MS. KOLER: Is that a sufficient foundation,  
19 Judge Noble, in order to go on?

20 JUDGE NOBLE: I'll allow the question now.

21 MS. MARCHIORO: I would only ask that you  
22 recall that Mr. Finnerty has only observed the site  
23 since 2002. My recollection is the question had to do  
24 with historic uses on the site; that's at least my  
25 recollection. But to the extent that there would be a





1 question about historic uses, I don't know that  
2 there's been a foundation laid to support that  
3 testimony.

4 MS. KOLER: Actually, if I could clarify, it  
5 was not with respect to historic uses. I asked him  
6 what observations, if any, that he made about the  
7 characteristics of the site before the fill was  
8 placed.

9 JUDGE NOBLE: That's right.

10 MS. MARCHIORO: And he answered that.

11 JUDGE NOBLE: That's what I remember her  
12 question was. I don't remember she was reaching back  
13 historically, but his answer did reach back and  
14 express some of the things that he had heard about the  
15 site.

16 MS. MARCHIORO: Okay.

17 JUDGE NOBLE: So do you understand it's just  
18 your own observations from the time you were there and  
19 you saw things?

20 THE WITNESS: Yes, I understand.

21 JUDGE NOBLE: So now he can answer.

22 MS. KOLER: Okay.

23 Q (Continuing by Ms. Koler) So, Mr. Finnerty, you were  
24 on the adjacent site from what year?

25 A Correct.



1 Q What year did you first go on the Weyerhaeuser --

2 A I'm only estimating, but I think from 2002 to 2005 we  
3 were actively engaged in the reclamation, and then, of  
4 course, it's an ongoing facility, and it's my first  
5 stop every morning.

6 Q So you go to Smith Island every morning?

7 A Correct.

8 Q And so it was during that period when you were going  
9 to the site every morning that you observed cows on  
10 the property that was then owned by Weyerhaeuser; is  
11 that correct?

12 A Correct.

13 Q Did you make any observations about the area on the  
14 35-acre site where Pacific Topsoils placed fill or a  
15 stockpile?

16 A Well, there's some monitoring wells out in that field,  
17 and occasionally there would be someone from, I don't  
18 know whether it was Parametrix or who was monitoring  
19 those wells, but someone would drive occasionally all  
20 around out in that field and go to those well sites,  
21 perform some duty there, I assume take water out,  
22 measure the water level, something like that.

23 I've observed it mowed a couple of times. When I  
24 was asked to place or stockpile material in that  
25 field, I chose to do so in the area that I did because

1       it was the driest part of that field.  
2       Q   So you didn't place it on moist areas; is that  
3       correct?  
4       A   That's correct.  
5       Q   And tell us about the area where you placed the fill.  
6       A   Well, it appeared to be either slightly higher in  
7       elevation or better drained for whatever reason. You  
8       know, there is a couple of obvious areas clear to the  
9       west where there was cattails growing in a small pond,  
10      for instance, and another area slightly north of there  
11      where you could observe standing water in the area  
12      that the fill was placed.  
13      Q   Let me just stop you. Did you place fill in those  
14      areas?  
15      A   No. They're still visible.  
16      Q   So that was a deliberate choice not to place fill in  
17      that area?  
18      A   Yes.  
19      Q   Okay. You can go on. I'm sorry I interrupted you.  
20      A   And that's really all there is. You know, I was asked  
21      to place fill out there, so I placed it in an area  
22      where -- well, and first of all, I was under the  
23      impression that we were going to be using this fill  
24      for placement on the landfill adjacent, or at least  
25      that was an option, and if I'm going to have to go

1 back and get the material, just as a matter of course,  
2 I'd put it where it was the driest.

3 Q And so are there specifications about the material  
4 that you have to put on your wood waste landfill cap?

5 A Well, yes, there's a lot of criteria that must be met  
6 in order for material to actually be used on the  
7 landfill cap that's adjacent to the original property.  
8 It has to pass gradation tests. And this material  
9 that I put out there, in large, passed most of those  
10 tests with the exception of water content, and of  
11 course that will change if you put it out there and  
12 let it dry.

13 So I would categorize the type of material that  
14 was put out there into two different categories. One  
15 of them was a high silt or clay type material. The  
16 other was more like a glacial till. So the only real  
17 effort was to separate those two streams, because when  
18 you go to reuse those types of material, there are  
19 differences in sensitivity to moisture when you handle  
20 it.

21 Q Now, you have a big stockpile of material out there.  
22 Did you have yard debris in that big stockpile?

23 A No.

24 Q Did you have wood debris?

25 A No.

1 Q Did you have construction debris?

2 A No.

3 Q The areas within the fill were just dirt; is that

4 correct?

5 A Well, there's been a lot of discussion about this in

6 the past, but there was clean dirt placed. Then I

7 placed concrete on top of that, in some areas up to

8 four feet thick, in order to create a stable enough

9 ballasted surface so that you can operate heavy

10 machinery on it.

11 Q Okay.

12 A Beneath that layer of concrete, there is no concrete.

13 Q So there's this driving surface on the top, and the

14 whole area ~~beneath that is clean dirt?~~

15 A That's correct.

16 Q And does Pacific Topsoils, when they're making a

17 stockpile, mix together different kinds of material?

18 A Well, when you're attempting to recycle materials, the

19 first thing you do is separate everything you possibly

20 can at the point of entry on the facility. So, you

21 know, there would be no reason to -- our every effort

22 is to separate those materials so they can be further

23 processed.

24 Q So you wouldn't have any interest in having fill or a

25 stockpile that had yard debris, construction debris

1 and all kinds of different stuff all mixed up  
2 together?

3 A That's correct.

4 Q And, in fact, if you had construction debris and some  
5 of those other materials, wouldn't the Snohomish  
6 Health District be out there, because don't they  
7 regulate those types of materials?

8 A I believe they do.

9 MS. ROLER: No further questions.

10 JUDGE NOBLE: Cross examination?

11

12 CROSS EXAMINATION

13 BY MS. MARCHIORO:

14 Q Mr. Finnerty, you were here when Mr. Bajsarowicz  
15 testified, weren't you, yesterday?

16 A Yes, I was.

17 Q And isn't it true that the fill was placed on the  
18 property for the purpose of expanding the composting  
19 operations?

20 A We don't have a composting operation at Smith Island.  
21 I'm sorry.

22 Q Well, whatever the soil processing operations are?

23 A Yes, there's soil processed.

24 Q So isn't it true that the purpose of placing another  
25 fill on the site, as Mr. Bajsarowicz testified



1     yesterday in your presence, was for the purpose of  
2     expanding those operations into the 35-acre parcel?

3     A     I would say that ~~that~~ would be no.     First of all --

4     Q     So Mr. Bajsarowicz is incorrect; is that what you're  
5     saying?

6     A     That's correct.

7     Q     Okay.     Now, isn't it true that none of the fill was  
8     tested for contaminants prior to being placed on the  
9     site?

10    A     Well, when material is brought to any of Pacific  
11    Topsoils' facilities, whether it be something that was  
12    stockpiled in this field, whether it's something that  
13    is delivered to any of their facilities and then  
14    further taken to some of our processing facilities,  
15    the first issue is whether or not those materials are  
16    clean.

17    Q     Well, I'm asking you, isn't it true that none of the  
18    fill was tested for contaminants, to your knowledge?

19    A     I don't have that knowledge.

20    Q     Okay.     And you just testified, isn't it true, that the  
21    fill contains concrete?

22    A     The fill does not contain concrete.

23    Q     Okay.     Now, would you be surprised -- have you had an  
24    opportunity to look at the well logs for the wells  
25    that were drilled through the fill?

1 MS. KOLER: Objection. Once again, this is  
2 outside the scope of direct. There was not a single  
3 question or a single response pertaining to those well  
4 logs.

5 MS. MARCHIORO: And I'd be happy to answer,  
6 if you want me to.

7 JUDGE NOBLE: I think it's going to the  
8 material that was placed on the site, and there was  
9 testimony that it was clean dirt and quite a bit of  
10 other testimony. I'm going to allow it.

11 And I think this is a preliminary question; is  
12 that right, Ms. Marchioro?

13 MS. MARCHIORO: Sure. I just have one point  
14 to make.

15 Q (Continuing by Ms. Marchioro) So it sounds like you  
16 would be surprised that, in fact, many of the well  
17 profiles, the profiles for the wells that were  
18 drilled, identified that wood was in the material that  
19 was removed to put the well in place?

20 A I was there when they drilled the holes. There was  
21 not a bunch of wood that came from any core samples,  
22 period.

23 Q So you're saying that the well driller is inaccurate  
24 as well as Mr. Bajsarowicz?

25 A Well, I was present when Mr. Bajsarowicz testified.

1 Mr. Bajsarowicz was not there, knows very little about  
2 soils, and I would be very surprised if there's any  
3 measurable amount of wood that was recovered in those  
4 bore holes. If there was, it would have been during  
5 the top four feet, because there is the possibility  
6 that there is a small amount of wood mixed with  
7 concrete that comes in with concrete material.

8 Q Okay. I thought --

9 A So it was the top four feet. It's possible that there  
10 would be wood mixed with that. Below that, it should  
11 be clean fill.

12 Q Were you there for every single truckload that was  
13 dumped on the site?

14 A No. My crew was.

15 Q Now, isn't it true that Pacific Topsoils accepted fees  
16 for allowing fill to be placed on the site?

17 MS. KOLER: Objection. This is totally  
18 outside the scope of direct, and I have a continuing  
19 objection to these questions that are outside the  
20 scope of direct.

21 MS. MARCHIORO: He supervised the filling,  
22 and to the extent that he knows, it was his  
23 responsibility to observe the filling, manage the crew  
24 that did the work on site. I think it's completely  
25 within the scope.

22. Ecology employee Anderson's testimony regarding his  
October 27, 2006 site visit.

1       October 27th site visit.

2       Q     And what did you document on your site visit in your  
3       field notes?

4       A     I documented the general field conditions, listed some  
5       species. It was a little uneven to walk on, so I  
6       thought possibly the site had been disked at some  
7       time.

8               And then I also describe the soil color, the fact  
9       that there were mottles at 10 inches, and the color of  
10      the mottles or redoximorphic features. The soil was  
11      moist but not wet at 12 inches, and there was  
12      occasional patches of spirea rows in unmowed areas.  
13      The reed canary grass and the spirea were dominant --  
14      those are wetland plants, wetland communities -- and on  
15      the north side of the fill, rills were visible, and I  
16      also saw concrete and wood and what appeared to me to  
17      be construction debris.

18      Q     Did you reach any conclusions regarding the site  
19      during your site visit?

20      A     Yes, I did.

21      Q     What were those conclusions?

22      A     I concluded that there were wetlands on site, fill had  
23      been placed in wetlands and that a delineation needed  
24      to be done.

25      Q     Do any of the manuals or guidance documents that you

1 A Yes.

2 Q Because you relied on rhizospheres which are at the end  
3 of the list, No. 7, seven out of ten, did you reevaluate  
4 the parameter to ensure that the proper decision was  
5 reached?

6 A I asked Pacific Topsoils to, and they never provided the  
7 information.

8 Q I'm sorry. You haven't gotten Dr. Kelly's report; is  
9 that correct?

10 A I got Dr. Kelly's report. I did not receive the  
11 Parametrix report, which their biologist stated that  
12 wetlands were found, and I asked Pacific Topsoils to do  
13 a delineation. My purpose was not to do a detailed  
14 delineation. |||||

15 I visited the site to determine whether I thought  
16 there was sufficient evidence to ask for a delineation  
17 and that wetlands had been filled, which is what I did. X

18 Q Did you observe that there were facultative species of  
19 plants at the site?

20 A I would have to look at my plant list. I think one or  
21 two of the species may be listed as facultative and some  
22 of the grasses maybe.

23 Q Certainly there were a lot of grasses on the site.

24 A Yes.

25 Q So in some areas that were grassy areas, there were

1 A It may be a manifestation of past agricultural activity.  
2 From a regulatory perspective, that doesn't necessarily  
3 mean the site would be viewed as agricultural land.

4 Q Well, these lands that Pacific Topsoils' property is  
5 located on, they certainly have been influenced by human  
6 activity, such as agriculture, have they not?

7 A They have been influenced. Agriculture is one of the  
8 influences.

9 Q And you can't take that out of the equation when you  
10 look at them, can you?

11 A I found wetland vegetation and wetland soils on the  
12 periphery of the fill and felt I had sufficient evidence  
13 to request a delineation.

14 Q But did you factor in to your analysis that this site  
15 has been disturbed by drainage facilities and so on?

16 A I'm not aware of drainage -- functional drainage  
17 facilities on the site.

18 Q You don't think the dikes have an effect on Pacific  
19 Topsoils' site?

20 A I would not define a dike as a drainage facility.

21 Q Water control facility?

22 A A dike is a form of a water control facility.

23 Q And the tidal gate and the dikes are influencing  
24 activities or conditions on the Pacific Topsoils' site,  
25 are they not?

1 A I'm not sure what a "facility" is.

2 Q (By Ms. Koler) A dike is a facility, is it not?

3 A I wouldn't describe it as a facility. As I and  
4 Mr. Stockdale have said repeatedly, the dikes would  
5 reduce the amount of flooding on the property, but it  
6 doesn't necessarily mean that wetland soils and wetland  
7 hydrology aren't present.

8 Q But it could?

9 A It could.

10 Q I mean, clearly it could, couldn't it?

11 A It could it; it could not.

12 Q And tide gates, same thing, couldn't it?

13 A Tide gates generally would reduce the amount of water on  
14 the site. Whether it reduces it below the threshold to  
15 meet a wetland, I don't know.

16 Q Drainage tiles?

17 A Drainage tiles could. I would expect that drainage  
18 tiles that had not been maintained for 24 years would  
19 have little or no effect.

20 Q Pipes?

21 A I'm not aware of pipes. Pipes potentially could. Pipe  
22 on top of the ground wouldn't have any effect on  
23 hydrology.

24 Q Pipes in ditches and so on would, would they not?

25 A I'm not clear where the pipe is or what the purpose is.



1 the wetlands under the fill?

2 A They used a methodology that I think is a standard of  
3 practice in wetlands delineation. And maybe, if I  
4 could, it would be easiest if I demonstrate for the  
5 Board.

6 You've got an area, you can look on an aerial  
7 photograph, you can see what this looks like. It's  
8 got certain characteristics, color, whatever. If you  
9 place something on top of it, now you can see that,  
10 well, some of it is obscured, but you can go back and  
11 look at the site conditions along the edge of this  
12 feature and determine that they're consistent with  
13 features outside the book and that from looking at  
14 aerial photographs or looking at the table before, I  
15 can infer that tabletop underneath the book is similar  
16 to the tabletop, you know, in and out.

17 What Parametrix did is they did transects across  
18 the site, which included going from unfilled portions  
19 of the site across the fill, unfilled portions of the  
20 site, again, similar to what I described with this  
21 illustration.

22 Q Now, is this consistent with your analysis?

23 A It's a more detailed analysis. What they did was a  
24 delineation. I never went on the site to do a  
25 delineation. I went on the site just to determine if

## 23. Trial Court Findings, Conclusions, and Order.

4

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SUPERIOR COURT  
THURSTON COUNTY WA

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BETTY J GOULD CLERK

BY \_\_\_\_\_ DEPUTY

☐ EXPEDITE  
☐ No Hearing Set  
☒ Hearing is Set  
Date: August 21, 2009  
Time: 9:00 a.m.  
Judge Thomas McPhee

STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT

PACIFIC TOPSOILS, Inc., a  
Washington Corporation; and DAVE  
FORMAN, an individual,

Appellants,

v.

THE WASHINGTON STATE  
DEPARTMENT OF ECOLOGY, a  
Division of the State of Washington,

Respondent.

NO. 08-2-01638-0

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

Pursuant to Chapter 34.05 RCW, this administrative appeal came before the Court on June 19, 2009. Pacific Topsoils, Inc. and Dave Foreman (PTI) appeared through their counsel, Jane Koler. The Department of Ecology (Ecology) appeared through its counsel, Senior Counsel Joan Marchioro. PTI's Petition for Review raised challenges under the Administrative Procedures Act, Chapter 34.05 RCW, to the Pollution Control Hearings Board's (Board) decision below, as well as constitutional claims outside of the Board's jurisdiction.

The Court reviewed all of the pleadings filed in this matter and has reviewed the full administrative record, including the transcript, volumes of exhibits filed with the Board, and

1 the written and oral arguments of the parties. Pursuant to RCW 34.05.570(1)(c) and .574(1),  
2 the Court enters the following Findings of Fact, Conclusions of Law, and Order.

3 **I. FINDINGS OF FACT**

4 1.1 PTI received clear notice of Ecology's asserted jurisdiction over the fill  
5 activities on wetlands at its Smith Island property both before and after Ecology issued its  
6 Administrative Order No. 4095 (Order No. 4095) and Notice of Penalty Incurred and Due No.  
7 4096 (Penalty No. 4096). The contention that PTI was spreading fill over wetlands was  
8 brought to PTI's attention in early summer 2006. By October 2006, Ecology was on-site  
9 investigating the presence of fill over wetlands; and PTI represented to Ecology that it was  
10 undertaking a wetlands delineation by a consulting firm, Parametrix.

11 1.2 On March 3, 2007, Ecology issued Penalty No. 4096 to Pacific Topsoils  
12 imposing an \$88,000 penalty for the unauthorized discharge of pollutants into waters of the  
13 state. Penalty No. 4096 notified PTI of (a) the location of the penalty site—PTI's Smith Island  
14 facility; (b) the authority for imposing the penalty—RCW 90.48.144(3); (c) the statute  
15 violated—RCW 90.40.080; and (d) the reason for the penalty—the placement of fill into  
16 approximately 12 acres of wetlands at PTI's Smith Island facility without a permit in violation  
17 of RCW 90.48.080.

18 1.3 In addition to Penalty No. 4096, on March 3, 2007, Ecology also issued Order  
19 No. 4095 to PTI. Order No. 4095 notified PTI of (a) the authority for issuing the Order—  
20 RCW 90.48.120(2); (b) of the clear connection between "into the waters of the state" (the  
21 language of the statute) and "wetlands" (Ecology's interpretation of the statute)—stating that  
22 the violation was the unlawful discharge of polluting matter into waters of the state through the  
23 placement of fill in wetlands at PTI's Smith Island facility; and (c) the connection between  
24 "discharge of polluting matter" and placement of the fill—stating that the unlawful discharge  
25 of polluting matters into waters of the state was comprised of the placement of fill material in  
26 the wetlands at PTI's Smith Island facility.

1 1.4 PTI appealed the Penalty and Administrative Order. The Board held an  
2 administrative hearing on February 20 and 21, 2008, at its offices in Lacey, Washington. All  
3 parties were represented by counsel at the hearing and presented evidence and testimony to the  
4 Board.

5 1.5 On June 12, 2008, the Board issued written Findings of Fact, Conclusions of  
6 Law, and Order. The Board affirmed Ecology's Administrative Order No. 4095 and Notice of  
7 Penalty Incurred and Due No. 4096 in full. PTI timely appealed the Board's decision to  
8 Thurston County Superior Court.

9 1.6 PTI separately moved for summary judgment on the issue of whether Ecology's  
10 enforcement authority under the state Water Pollution Control Act (WPCA), Chapter  
11 90.48 RCW, extended to wetlands. This Court denied PTI's motion, concluding that the  
12 WPCA does encompass wetlands and Ecology has authority to enforce statutes regulating  
13 those wetlands.

14 1.7 On July 14, 2009, this Court issued an Opinion affirming the Board's Findings  
15 of Fact, Conclusions of Law and Order. The Court's Opinion is incorporated by reference into  
16 this Final Order and provides additional legal analysis and reasoning for the Court's decision.

## 17 II. CONCLUSIONS OF LAW

18 2.1 The findings of fact challenged by Pacific Topsoils are supported by substantial  
19 evidence and are not arbitrary and capricious.

20 2.2 PTI's challenges to the Board's conclusions of law are insubstantial and  
21 unpersuasive. PTI has failed to show that the PCHB's order is invalid due to erroneous  
22 interpretation or application of the law.

23 2.3 Wetlands are waters of the state as defined in RCW 90.48.020 and WAC 173-  
24 201A-020. As waters of the state, under the provisions of the WPCA, Ecology is authorized to  
25 regulate wetlands and take appropriate enforcement actions. Ecology properly exercised that  
26 authority in this case.

1 2.4 PTI alleged that Ecology's Order No. 4095 and Penalty No. 4096 failed to  
2 provide sufficient notice of the claims against it and thus violated applicable due process  
3 requirements. PTI further alleged that the Board's procedure and conduct of the administrative  
4 hearing violated its due process. The Court finds no merit to PTI's due process claims. PTI  
5 failed to demonstrate that Ecology's Order No. 4095 and Penalty No. 4096 violated due  
6 process requirements. PTI further failed to demonstrate that Board's administrative proceeding  
7 violated due process requirements.

8 2.5 PTI also alleged that RCW 90.48.080 is unconstitutionally vague as applied to  
9 it. PTI did not meet the heavy burden required to prevail on such a claim. The Court  
10 concludes that RCW 90.48.080 is not unconstitutionally vague as applied to PTI.

11 **III. ORDER**


12 Based on the foregoing Findings of Fact and Conclusions of Law, the Court orders that  
13 the June 12, 2008, Findings of Fact, Conclusions of Law and Order of the Pollution Control  
14 Hearings Board is AFFIRMED. The Court further orders that PTI's constitutional due  
15 process and void for vagueness challenges are DENIED.

16 DONE IN OPEN COURT this 21 day of August, 2009.

17   
18 JUDGE THOMAS MCPHEE

19 **Presented by:**

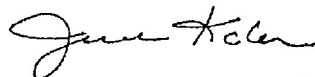
20 ROBERT M. MCKENNA  
21 Attorney General

22   
23 JOAN M. MARCHIORO, WSBA #19250  
24 Senior Counsel  
25 Attorneys for Respondent

**Approved as to form:**

LAW OFFICES OF JANE RYAN KOLER

26 JANE RYAN KOLER, WSBA #13541  
Attorney for Appellants



24. Testimony of Ecology employee Anderson that aerial photos  
do not demonstrate the presence of wetland.

1 already hired them. So you've also hired other people,  
2 and I am also aware of that.

3 Q And Pacific Topsoils had a right to have a consulting  
4 expert, did it not?

5 A Absolutely.

6 Q And it then went on and hired people who actually  
7 conducted testing beneath the fill?

8 A That's correct.

9 Q And isn't that going to be a lot more valid than not  
10 even looking at the area beneath the fill?

11 A Well, we have an interest in getting information about  
12 what is under the fill. There's no doubt about that.

13 Q And has anything led you to believe that the Parametrix  
14 report that Ecology has been so focused on getting, that  
15 it involved testing of the area beneath the fill?

16 A My understanding is that the Parametrix report did not  
17 test under the fill. It was delineating the wetlands at  
18 the edge of the fill.

19 Q So that report really wouldn't be as relevant as studies  
20 that are now being done to determine what's beneath the  
21 fill, would it?

22 A It's as relevant because it informs the wetlands that  
23 have not yet been filled on the site that I believe  
24 Pacific Topsoils has an interest in filling.

25 Q And are you aware that they've abandoned that plan?



1 A I don't know what Pacific Topsoils' plans are currently.

2 Q But at one time, you were aware that they did plan to  
3 fill that entire 37-acre site?

4 A That's correct.

5 Q And that they were going to gather information which  
6 helped them make a determination about whether that was  
7 a feasible plan?

8 A Okay.

9 Q So I guess I don't understand why Ecology would not be  
10 satisfied with Dr. Kelly's analysis, his continuing  
11 analysis, if Dr. Kelly is actually studying the area  
12 beneath the fill. That's the area subject to the  
13 penalty. Wouldn't those studies be the most relevant of  
14 all studies?

15 A It would help us, if it's done correctly, figure out as  
16 best as we can the extent of the violation that has  
17 occurred on the site.

18 Q Because like to date, unless I'm missing something,  
19 isn't Dr. Kelly's study the only study of the area  
20 beneath the fill?

21 A As far as I know, it is the only effort that has been  
22 made to look at wetland conditions on the site.

23 Q And so I guess if Pacific Topsoils hired a well-  
24 respected expert as soon as they were aware of Ecology's  
25 concerns, why would Pacific Topsoils be accused of foot

1 Q (By Ms. Koler) Okay. But these earlier photos, when  
2 you look at it -- when you look at this 2000 aerial  
3 photo, can you tell that this is a wetland?

4 A No, not from the photo itself.

5 Q So the photos -- just so I'm straight and understand  
6 your position, the photos don't present any evidence  
7 that a wetland was filled?

8 A They are one of the pieces of evidence that we look at  
9 when we consider the violation. They identify the area.  
10 You can see where there isn't fill. You can see where  
11 there is fill, but we are not relying on them alone to  
12 determine whether wetlands have been filled.

13 Q Do these photographs tell you if this area, which  
14 eventually was filled, is a wetland?

15 A No.

16 Q Looking at the 2002 photographs, do these photographs  
17 tell you that the area which was eventually filled was a  
18 wetland?

19 A No.

20 Q So they're just more descriptive material of the area --

21 A Correct.

22 Q -- which was eventually filled?

23 A Yeah.

24 Q So these photographs are really just anecdotal  
25 information about the area that was filled?

1 A Well, I'm not sure what you mean by "anecdotal." These  
2 are photographs. They show the site conditions. I  
3 believe that, you know, they're labeled at a given time,  
4 and I believe that that's accurate. They are part of  
5 what we looked at when we considered the violation.

6 Q Okay. But these photographs wouldn't be used as  
7 evidence that there was a wetland that was subsequently  
8 filled?

9 A Not by themselves. They may be used for illustrative  
10 purposes to show where wetland was identified on the  
11 ground, something to that effect, but to look at the  
12 photo and say, "This is wetland. This is not," they're  
13 simply supporting evidence.

14 Q And I guess to clarify, they're supporting evidence in  
15 that they present evidence about the context of where  
16 the fill occurred?

17 A That's correct.

18 Q But not that wetlands were filled?

19 A You can't say from the photos whether wetlands were  
20 filled.

21 Q Going on to look at the 2004 photographs of the site,  
22 what do these photographs tell you that led you to the  
23 conclusion that a penalty should be imposed?

24 A The photographs were one of the pieces of evidence that  
25 we looked at, as I've said. They weren't more

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NO. 39691-2

STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION II**  
**OF THE STATE OF WASHINGTON** ~~DEPUTY~~

PACIFIC TOPSOILS, Inc., a  
Washington Corporation and DAVE  
FORMAN, an individual,

Appellants,

v.

THE WASHINGTON STATE  
DEPARTMENT OF ECOLOGY, a  
Division of the State of Washington,

Respondent.

**CERTIFICATE OF  
SERVICE**

Pursuant to RCW 9A.72.085, I certify that on the 3rd day of March, 2010, I caused to be served Brief of Respondent State of Washington, Department of Ecology in the above-captioned matter upon the parties herein as indicated below:

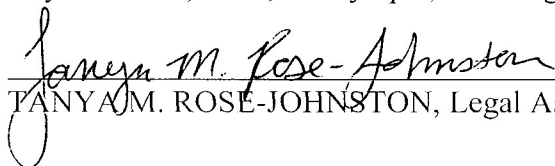
JANE RYAN KOLER, PLLC  
ATTORNEY AT LAW  
P.O. BOX 2509  
5801 SOUNDVIEW DR STE 258  
GIG HARBOR, WA 98335

☒ U.S. Mail  
☐ State Campus Mail  
☐ Hand Delivered  
☐ Overnight Express  
☐ By Fax

the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of March, 2010, in Olympia, Washington.

  
TANYA M. ROSE-JOHNSTON, Legal Assistant